# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 227.

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HENRY J. HAVNOR, PLAINTIFF IN ERROR,

*vs.*

THE PEOPLE OF THE STATE OF NEW YORK.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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FILED SEPTEMBER 2, 1896.

(16,375.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 26, 1897.

No. 172.

The People of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or may concern, Greeting:

Know ye that we, having examined the records and files in the office of the clerk of the county of New York and clerk of the supreme court of said State for said county, do find a certain record (except petition and opinion of the court of appeals) there remaining in the words and figures following, to wit:

[Seal of New York.]

IN THE

# Supreme Court of the United States.

*Ex Parte*, HENRY J. HAVNOR, Petitioner.

PETITION FOR WRIT OF ERROR, requiring the Supreme Court of the State of New York to certify to the Supreme Court of the United States for its review and determination the case of The People of the State of New York against Henry J. Havnor.

TO THE HONORABLE ~~SUPREME~~ COURT OF ~~THE UNITED STATES~~ Appeals of the State of New York.

The petition of Henry J. Havnor respectfully shows to this Honorable Court as follows:

I.—That your petitioner is a citizen of the United States and of the State of New York, and is a barber by trade, residing and doing business in the City of New York.

II.—That heretofore an act was passed by the Legislature of the State of New York, and is now in force, entitled, Chapter 823 of the Laws of 1895, commonly styled the "Collins Act," and which provided as follows:

"An Act to regulate barbering on Sunday.

"SECTION I.—Any person who carries on or engages in the business of shaving, hair cutting or

"other work of a barber on the first day of the
"week, shall be deemed guilty of a misdemeanor
"and upon conviction thereof shall be fined not
"more than five dollars and upon a second con-
"viction for a like offense shall be fined not less
"than ten dollars and not more than twenty-five
"dollars, or be imprisoned in the County Jail for a
"period of not less than ten days nor more than
"twenty-five days, or be punishable by both such
"fine and such imprisonment at the discretion of
"the Court or Magistrate, provided that in the City
"of New York and the Village of Saratoga Springs
"barber shops or other places where a barber is en-
"gaged in shaving, hair cutting or other work of
"a barber may be kept open and the work of a
"barber may be performed therein until one o'clock
"of the afternoon of the first day of the week.

"SECTION II.—This act shall take effect on the
"first day of June, 1895."

III.—That on the 9th day of June, 1895, your petitioner was arrested by direction of the police authorities of New York City upon the charge of violating said act on the day of the arrest (Sunday) by keeping open shop after 1 P. M. Petitioner was afterward on the fourth day of November, 1895, tried upon this charge and fined five dollars, which was paid under protest and an appeal taken from the judgment of conviction to the Appellate Division of the Supreme Court of the State of New York for the First Department, where said conviction was affirmed on the 7th day of February, 1896. That thereupon a second appeal was taken to the Court of Appeals of the State of New York from said judgment of conviction and there a decision was rendered on or about April 14, 1896, by a divided court, which stood four against three for affirmance of the said conviction. That the ground on which these two separate appeals have been taken by petitioner is the claim that Chapter 823 of the Laws

of 1895 is void, not only because it is an improper 7
exercise of the police power of the State, but void also because it is violative of the Fourteenth Amendment of the Constitution of the United States, providing that "no person shall be deprived of life, liberty or property without due process of law" and of the corresponding clause in the Constitution of the State of New York (see Article 1, Section 1).

IV.—That a transcript of the record in this case from its commencement duly certified under seal of the Clerk of the City and County of New York is hereto annexed.

V.—That your petitioner is advised by counsel 8
and verily believes that this is a case provided for by Section 709 of the Revised Statutes of the United States, in which the validity of a State statute is drawn into question, as being repugnant to the Constitution of the United States and to the rights guaranteed thereunder to citizens of the several States and where a decision of the highest State Court has been rendered in favor of said statute. That petitioner further shows that it will be not only of great importance to him to have the consitutional question involved in this case submitted for decision to the highest Court in the land, but that a final decision of the matter there would settle the doubts now existing 9
in the minds of the people of the State at large who are effected by the action of this law either pecuniarily or in suffering personal inconvenience by not having a barber's assistance for Sunday shaving.

VI.—The proof on the trial actually showed that keeping open barber shops on Sunday not only served the convenience of some, but the *actual necessities* of others who were unable to shave themselves, and needed to do so every day, in order to preserve a decent cleanly appearence.

10 VII.—The petitioner therefore maintains:

FIRST.—That by operation of the statute he is deprived of liberty, as that term is defined under the Constitution, that is freedom to carry on a *necessary and lawful occupation* at a *lawful and necessary time.*

SECOND.—That by losing the profits of Sunday business petitioner is deprived of his property as much as if the fixtures of his shop were confiscated or destroyed by the Government.

Wherefore, your petitioner prays that a writ of error may issue from this Court directed to the Supreme Court of the State of New York, to
11 which Court this case has been remitted by the New York Court of Appeals, requiring said Supreme Court to certify the said record to this Court, to the end that said case may be reviewed and determined by this Court as provided by the Revised Statutes of the United States, and that said Chapter 823 of the Laws of New York for 1895 may be declared unconstitutional, and that the judgment of conviction heretofore rendered against your petitioner under said law may be reversed, and for such other relief as to this Honorable Court may seem just.

And your petitioner will ever pray, &c.

ALBERT I. SIRE,
Attorney for Petitioner,
99 Nassau St.,
N. Y. City.

12 H. J. Havnor, Petitioner

UNITED STATES OF AMERICA, }
City and County of New York, } ss.:

HENRY J. HAVNOR, being duly sworn, says: That he is the petitioner in the foregoing petition. That he has read said petition, and knows the contents thereof. That the same is true to his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

Sworn to before me, } Henry J. Havnor
April 27, 1896. }

Warren J. Bull.
Notary Public

## Transcript of the Record.

13

COURT OF SPECIAL SESSIONS

FOR THE CITY AND COUNTY OF NEW YORK.

THE PEOPLE OF THE STATE OF NEW YORK

AGAINST

HENRY J. HAVNOR.

14

To Hon. JOHN R. FELLOWS,
District Attorney of the City and County of New York.

To THEODORE F. MCDONALD, Esq.,
Clerk of the Court of Special Sessions of the City and County of New York.

You will please take notice that the above named defendant hereby appeals to the General Term of the Supreme Court of the State of New York, hereafter to be held in the First Department thereof, from the judgment of this Court, rendered on the fourth day of November, 1895, and from all the incidents relating thereto, and from each and every part thereof, and from the whole of said judgment.

15

Dated New York, November 7, 1895.

ALBERT I. SIRE,
Attorney for Defendant-Appellant,
99 Nassau Street,
N. Y. City.

16 POLICE COURT—SECOND DISTRICT.

City and County of New York, ss.:

BERNARD MCGOVERN, of 19th Precinct, aged 27 years; occupation, police officer; being duly sworn, deposes and says: That on the 9th day of June, 1895, at the City of New York, in the County of New York, Henry J. Havnor, now here, did violate Chapter 823, Laws of 1895, at premises 57 West Thirty-third street, under the following circumstances: on said day deponent entered the defendant's premises and was shaved after one o'clock, P. M., by one of defendant's employees, while defendant was
17 present in said premises.

BERNARD MCGOVERN.

Sworn to before me this 10th day of June, 1895.

CHARLES N. TAINTOR,
Police Justice.

City and County of New York, ss.:

HENRY J. HAVNOR, being duly examined before the undersigned, according to law, on the annexed charge, and being informed that it is his right to make a statement in relation to the charge against him, that the statement is designed to enable him, if he sees fit, to answer the charge and explain the
18 facts alleged against him, that he is at liberty to waive making a statement and that his waiver cannot be used against him on the trial.

Q. What is your name?
A. Henry J. Havnor.
Q. How old are you?
A. Thirty-eight years.
Q. Where were you born?
A. Albany, New York.
Q. Where do you live and how long have you resided there?
A. 460 West Thirty-fourth street. Two months.

Q. What is your business or profession? 19

A. Barber.

Q. Give any explanation you may think proper of the circumstances appearing in the testimony against you, and state any facts which you think will tend your exculpation.

A. I am not guilty. At one o'clock I closed.

H. J. HAVNOR.

Taken before me this 10th day of June, 1895.

CHARLES N. TAINTOR,
Police Justice.

It appearing to me by the within depositions and statements that the crime therein mentioned has been committed and that there is sufficient cause to believe 20
the within named defendant guilty thereof, I order that he be held to answer the same and he be admitted to bail in the sum of one hundred dollars and be committed to the Warden of the City Prison of the City of New York, until he gives such bail.

Dated June 10, 1895.

CHARLES N. TAINTOR,
Police Justice.

I have admitted the above named defendant to bail to answer by the undertaking hereto annexed.

Dated June 10, 1895.

CHARLES N. TAINTOR,
Police Justice. 21

22 POLICE COURT—SECOND DISTRICT.

City and County of New York, ss.:

| | |
|---|---|
| THE PEOPLE<br>vs.<br>HENRY J. HAVNOR. | On Complaint of Bernard McGovern for violation of Chapter 823, Laws of 1895. |

23 After being informed of my rights under the law I hereby waive a trial by jury on this complaint and demand a trial at the Court of Special Sessions of the Peace to be holden in and for the City and County of New York.

Dated June 10, 1895.

H. J. HAVNOR.

CHARLES N. TAINTOR,
Police Justice.

24

[Endorsement:] 25

POLICE COURT—SECOND DISTRICT.

| | |
|---|---|
| THE PEOPLE, &c., on the complaint of BERNARD MCGOVERN<br><br>vs.<br><br>HENRY J. HAVNOR. | Offense.<br>Vio. of Chapter 823, Laws of 1895. |

Dated June 10, 1895.

26

TAINTOR,
Magistrate.

McGovern, Officer, 19th Precinct.
Pleads N. G. on 10-24-95.

Plea of N. G. withdrawn and demurrer to be filed with District Attorney before October 26, 1895.

(Note by Counsel: Demurrer withdrawn and plea of N. G. Restored. See testimony.) Tried 11-4-95.

Sentence $5; paid W. C. H.

1st Bench. Fine paid under protest.

27

28 COURT OF SPECIAL SESSIONS.

CITY AND COUNTY OF NEW YORK.

THE PEOPLE

AGAINST

HENRY J. HAVNOR.

Before Justice W. C. HOLBROOK, Presiding; Justices HINSDALE and HAYES, Associates.

29 NOVEMBER 4, 1895.

JACOB BERLINGER, Esq., Assistant District Attorney, for the People.
ALBERT I. SIRE, Esq., for the Defendant.

The demurrer heretofore filed as ordered by the Court being withdrawn on motion of defendant's counsel a plea of not guilty was substituted therefor.

It is admitted by the defendant, and on behalf of the defendant by his counsel, that on the 9th day of June last the complainant in this case, Bernard McGovern, visited the barber shop of the defendant at five minutes past one o'clock in the afternoon, and was there shaved.

30 BERNARD MCGOVERN, the complaining witness, was now called and sworn; he is a member of the Nineteenth Precinct.

CROSS-EXAMINATION:

By Mr. Sire:

Q. What was your business on the 9th of June last?

A. Police officer.

Q. In the City of New York?

A. Yes, sir.

Q. And at whose request did you go to the barber shop of Henry J. Havnor? 31

A. Captain Pickett.

Q. What did he direct you to do?

Question objected to. Sustained. Exception by defense.

Q. At the request of Captain Pickett you went to the shop—where is that located?

A. 57 West Thirty-third street.

Q. Near the corner of Broadway?

A. Yes, sir.

Q. And after you reached there what did you do?

A. I went in there and got a shave.

Q. And after you finished being shaved what did you do? 32

A. I placed the proprietor under arrest.

By Mr. Berlinger:

Q. Did you pay him?

A. Yes, sir; twenty-five cents.

HARRY J. HAVNOR, the defendant in this action, was now sworn in his own behalf; he testifies as follows:

By Mr. Sire:

Q. Mr. Havnor, were you in busines on the 9th of June, 1895? 33

A. Yes, sir.

Q. And where was your place of business?

A. 57 West Thirty-third street, the Alpine Building.

Q. How long have you been conducting business there?

A. Nine years.

Q. And in what business were you engaged there during the past nine years?

A. Hair dressing, a barber shop and shaving.

34 Q. How large an establishment have you there; how many chairs?

A. Eleven chairs.

Q. Any baths?

A. Three baths; and two ladies' hair dressing chairs.

Q. Have you ever been charged with a violation of the law prior to the 9th of June, 1895?

A. No, sir.

Q. Now, what were your habits about keeping your shop open on Sunday afternoons?

Question objected to; sustained; exception by the defense.

35 Q. Well, did you keep your shop open Sunday afternoons?

A. Yes, sir.

Q. And for what purpose?

A. For shaving and hair cutting aud hair dressing.

By the Court:

Q. Up to the passage of this law you were in the habit of keeping open?

A. Yes, sir; until eight o'clock in the evening.

By Mr. Sire:

Q. And had you customers that it was necessary
36 to shave during the afternoon?

Question objected to; sustained; exception by defense.

Mr. Sire: I desire to show that shaving and barbering on Sunday afternoon are necessary.

The Court: We are inclined to think that you cannot prove it in that way.

Q. Had you customers that could not attend during the morning, Mr. Havnor?

Question objected to; sustained; exception.

Q. What class of people did you have there?

A. The high class, the upper ones. 37

Q. Do you know what their habits and customs were?

A. Yes, sir.

Q. State what it was?

Question objected to; sustained; exception by the defense.

Q. State any particular person who could not get there during the morning hours or prior to one o'clock in the afternoon?

A. Yes, sir, Barney Michaels.

Q. What time did he get there to get shaved, and why couldn't he get there before one o'clock?

A. His business was late at night. 38

Q. Was it necessary for him to be shaved after one o'clock?

Question objected to; sustained; exception by the defense.

Q. What time in the day was he in the habit of reaching your shop on Sundays?

A. Three or four o'clock in the afternoon.

Q. Did you have any other customers who could not get there during the morning hours?

Question objected to; sustained; exception by the defense.

Q. Did you have any customers that required shaving every day? 39

Question objected to. Objection sustained. Exception by the defense.

Q. And you had customers that were unable to shave themselves?

Question objected to. Sustained. Exception by defense.

Q. Will you name one?

A. Mr. DeCam, he stops at the Alpine.

Q. Had you any customers who were engaged in

40 the printing business, who were kept up almost every night, Saturday night, and who required shaving on Sunday afternoon?

A. Yes, sir.

Q. Were there a large number of your customers that rose late on Sunday morning, to your knowledge?

A. Yes, sir.

Q. How late on Sunday morning?

A. One or two o'clock.

The Court: What is the use in going into this testimony.

Mr. Berlinger: I hate to object.

The Court: If a man lies in bed until one o'clock
41 or after, and then comes in and violates the law, the Court has not anything to do with that.

Mr. Sire: I assume that our Honors will not pass upon the question of constitutionality, but I desire to go to the General Term of the Supreme Court and have this question passed upon.

The Court: We shall not pass upon a question of that kind here.

Mr. Sire: I desire to make my record complete here.

The Court: Proceed, we will give you every opportunity that is reasonable.

Q. Did many of your customers that were in the
42 habit of being shaved in the afternoon also take the use of your baths?

A. Yes, sir.

Q. And did many of them have beards that required cutting on Sunday afternoon?

A. Yes, sir.

Q. And also others that required shaving?

A. Yes, sir.

Q. And did you shave those same customers every day in the week?

A. Yes, sir.

Q. And were some of your customers unable to shave themselves?

A. Yes, sir.

Q. Was it necessary to shave them on Sunday afternoons? 43

A. Yes, sir.

Q. Did their beards grow so fast every day that it was a matter of cleanliness in order to have them shaved?

A. Yes, sir.

Q. Now, since your arrest on the 9th of June you have not violated the Collins's Law, this Act?

Question objected to. Sustained. Exception by the defense.

Mr. Sire: No other questions.

The Court: Is that your case?

Mr. Sire: That is my case. Now, if the Court 44
please, I move for the discharge of the prisoner on the ground that it appears from the testimony that barbering on Sunday is a work of necessity. That being so, the act which prohibits barbering on Sunday, under the decisions of the Court of Appeals of this State, would be unconstitutional, and I contend that the act being unconstitutional, the prisoner cannot be held. Now, if your Honors desire to hear me, I have my brief on that question, with the decisions rendered by the Court of Appeals. I would be glad to argue on that point. We have had a Special Term decision in the City of Brooklyn, rendered by Justice Cullen, I believe, holding the act to be 45
constitutional. We have had a Special Term decision rendered by Judge Stover, before whom I brought my application, in substance, holding the act constitutional. Therefore, I assume that your Honors would prefer to have the matter go to the General Term rather than pass upon it here.

The Court: We shall not undertake to pass upon that question. Make your formal motion, which will be denied, and we will give you an exception.

Mr. Sire: I move to dismiss the complaint, and ask that the prisoner be discharged, on the ground that

46 it appears that the work complained of was a work of necessity. And I contend that, under the decisions rendered by the Court of Appeals, the act itself is unconstitutional. That being so, the prisoner must be discharged.

Motion denied. Exception by the defense.

The Court: The Court finds the defendant guilty, and imposes a fine of five dollars. That is the only thing that can be done for the first offense.

Mr. Sire: Now, I would like to move in arrest of judgment, in order to give me an opportunity to go to the General Term of the Supreme Court.

We will pay the fine under protest.

47 Mr. Berlinger: I do not see how an arrest of judgment can be granted. He can pay his fine under protest.

The Court: That is the proper way, I believe.

The fine is paid under protest.

48

At a Court of Special sessions of the City and County of New York, held in and for the City and County of New York, at the building for Criminal Courts in said city, on Monday, the 4th day of November, in the year of our Lord one thousand eight hundred and ninety-five. 49

Present—The Hons. WM. C. HOLBROOK,
ELIZUR B. HINSDALE and
JOHN HAYES,
*Justices of the Court of Special Sessions.*

50

| | |
|---|---|
| THE PEOPLE OF THE STATE OF NEW YORK<br><br>vs.<br><br>HENRY J. HAVNOR. | On conviction by trial of the misdemeanor of violating Chapter 823 Laws of 1895 at premises 57 West 33d Street, under the following circumstances on the 9th day of June, 1895: Bernard McGovern entered the defendants' premises and was shaved after one o'clock P. M. by one of the defendants' employees while defendant was present in said premises. |

It is thereupon ordered and adjudged by the Court that the said Harry J. Havnor for the misdemeanor aforesaid, whereof he was convicted, pay a fine of five dollars. Fine paid.

51

(A true extract from the minutes).

T. F. MCDONALD,
Clerk.

I, THEODORE F. MCDONALD, clerk of the Court of Special Sessions of the City and County of New York, held in and for the City and County of New York, do hereby certify that the foregoing is a copy of the notice of appeal and of the judgment roll in the case of The People against Henry J. Havnor, convicted by the said Court of a violation

52 of Chapter 823, Laws of 1895, now on file in the Clerk's office of said Court of Special Sessions, and that the same have been compared by me with the originals and are correct transcripts therefrom, and of the whole of such originals.

Given under my hand and attested by the seal of the said Court this 19th day of November, in the year of our Lord one thousand eight hundred and ninety-five.

Secs. 485, 532 and 517 Code Criminal Pro.

[L. S.] T. F. McDONALD,
Clerk.

53

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NEW YORK SUPREME COURT,

GENERAL TERM—FIRST DEPARTMENT.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents,

vs.

HENRY J. HAVNOR,
Appellant.

54

It is hereby stipulated and agreed that the foregoing shall be taken and deemed to be a complete and correct copy of the case on appeal herein and that the said record comprises all the testimony herein and the printed case may be filed as the original.

JOHN R. FELLOWS,
District Attorney.
ALBERT I. SIRE,
Attorney for Appellant.

On the foregoing consent and stipulation it is ordered that the foregoing case on appeal be and the same are hereby settled and signed as such and that the same be placed on file as the original. 55

Dated New York, November 19, 1895.

WM. C. HOLBROOK,
Justice.

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At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the First Department at the Court House of the said Appellate Division in the City of New York, on the Seventh day of February in the year of our Lord one thousand eight hundred and ninety-six. 56

Present—The Hons. CHARLES VAN BRUNT, *P. J.*
GEORGE C. BARRETT,
WILLIAM RUMSEY,
PARDON C. WILLIAM,
GEORGE L. INGRAHAM, } *JJ.*

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents,

AGAINST

HENRY J. HAVNOR,
Appellant. 57

The above named appellant having been at a Court of Special Sessions in and for the City and County of New York on the fourth day of November in the year of our Lord one thousand eight hundred and ninety-five in due form of law convicted of a

misdemeanor and judgment thereon duly rendered against him;

And the appellant having thereafter duly appealed from the said judgment to this Court, and the said appeal having come on to be heard in due form of law,

Now, therefore, after hearing Albert I. Sire, Esq., of counsel for the appellant, and John D. Lindsay, Assistant District Attorney for the respondents, due deliberation being had thereon, it is

Ordered and adjudged, that the said judgment of the said Court of Special Sessions so appealed from as aforesaid be and the same hereby is in all things affirmed. And it is further ordered that the said judgment of the said Court of Special Sessions be and the same is hereby directed to be enforced and carried in execution and effect.

(A copy.)
ALFRED WAGSTAFF,
Clerk Appellate Division, Supreme Court, First Department.

(Endorsed)—Filed February 11, 1896.

ALFRED WAGSTAFF,
[L. S.] Clerk Appellate Division, Supreme Court, First Department.

SUPREME COURT—APPELLATE DIVISION. 61

FIRST DEPARTMENT, JANUARY, 1896.

Present—The Hons. CHARLES H. VAN BRUNT, *P. J.*,
GEORGE C. BARRETT,
WILLIAM RUMSEY,
PARDON C. WILLIAMS,
GEORGE L. INGRAHAM, } *JJ.*

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

vs.

HENRY J. HAVNOR,
Appellant.

62

No. 84.

APPEAL FROM JUDGMENT OF THE COURT OF SPECIAL SESSIONS.

Mr. JOHN R. FELLOWS, for Respondent.
Mr. A. I. SIRE, for Appellant.

INGRAHAM, *J.*—The appellant was convicted for a violation of Section I. of Chapter 823 of the Laws of 1895, and he appeals on the ground that the act is unconstitutional as a violation of the provision of the Constitution that "No person shall be deprived of life, liberty or property without due process of law." 63

The act in question prohibits any person from carrying on or engaging in the business of shaving, hair cutting, or other work performed by a barber on the first day of the week, and provides a punishment for such offense. It is claimed that the law falls within the principle established by People *v.* Jacobs, 98 N. Y., 107; People *v.* Marks, 99 N. Y.,

64 377; and People *v.* Gilson, 109 N. Y., 389. In the case last cited the principle as stated is that "A person living under our Constitution has the right to adopt and follow such lawful industrial pursuit not injurious to the community as he may see fit. * * * Liberty in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways to live and work when he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation." And in the case of the People *v.* Marks (*supra*) the Court say: "Under an exercise of the police power, the enactment must have
65 reference to the comfort, the safety or the welfare of society, and must not be in conflict with the Constitution. The law will not allow the rights of property to be invaded under the guise of a police regulation for the protection of health, when it is manifest such is not the object and purpose of the regulation." And while it is generally for the Legislature to determine what laws and regulations are needed to protect the public health and serve the public comfort and safety, if its measures are calculated, intended, convenient or appropriate to accomplish such ends, the exercise of its discretion is not the subject of judicial review. But those measures must have some relation to these ends.

66 Courts must be able to see upon a perusal of the enactment that there is some fair, just and reasonable connection between it and the ends above mentioned. Unless such relation exists, the enactment cannot be upheld as an exercise of the police power. The question is, whether the prohibition of a particular trade upon Sunday is a violation of the principle thus established. There is nothing in this act that attempts to provide that the appellant shall not carry on his particular trade or calling in any manner or at any place that he pleases. He is simply prohibited from carrying on that trade upon Sunday. An examination of the legislation of most, if

not all the States, will show that that subject was 67
regulated by statute prior to the adoption of the Federal Constitution and of the Constitution of this State; and the prohibition of work upon Sunday, more or less severe, was in force in all the States at that time, and the right of the Legislature to regulate the observance of the Sabbath has been recognized without exception by this and some of the States since the formation of our Government.

Thus in the case of the People *v.* Moses, 140 N. Y., 215, the Court say: "The Christian Sabbath is one of the civil institutions of the State, and that the Legislature, for the purpose of promoting the moral and physical well being of the people, and the 68
peace, quiet and good order of society, has authority to regulate its observance and prevent its desecration by any appropriate legislation, is unquestioned." The Legislature thus having the authority to regulate the observance of the Sabbath, we cannot review its discretion, or determine upon the expediency, wisdom or propriety of legislative action in matters within the power of the Legislature. (See People *v.* Bolton, 55 N. Y., 54.)

In the case of Lindenmuller *v.* People, 33 Barb., 554, a case that has been cited with approval in many cases, it was expressly held that the Legislature has the power to determine what acts it is necessary to prohibit on Sunday for the purpose of 69
promoting the moral and physical well-being of the people, and for the purpose of preventing desecration of the Sabbath; that it was a matter within the Legislature's discretion and power and that the Courts could not review their discretion and sit in judgment upon the expediency of their acts. It is for the Legislature to say what business it is necessary to prevent for the proper regulation or observance of the Sabbath; and so long as the regulations described have relation to that particular object, the discretion of the Legislature cannot be controlled by

70 the Court. This is in accord with the case of the People *ex rel.* Hobach *v.* Sheriff, 13 Misc. 587.

The objection is also made to this act on the ground that it is class legislation, granting a privilege to persons transacting business in New York and Saratoga which is not allowed outside of those localities. We do not think that the act can be questioned upon this ground. If the Legislature has power to regulate the observance and prevent the desecration of the Sabbath, it has the power to say what acts in the different localities of the State it is necessary to prohibit to accomplish this purpose. It is quite conceivable that an act in one locality thickly settled should be prohibited, which in
71 sparsely settled districts of the State could be allowed; and for this reason an act might be objectionable in one district which will not in another. All of these regulations have in view the proper observance of the day and are within the discretion of the Legislature (Matter of Bayard, 25 Hun, 546).

We have been referred to the case of People *v.* Eden, decided by the Circuit Court of Cook County, Illinois, in which it appears to have been held that the Legislature cannot single out any one calling and make it the subject of special legislation. We cannot assent to the views there expressed so far a they relate to laws passed regulating the observance of Sunday. In the case of People *v.* Lindenmuller
72 (*supra*) a prohibition of theatrical performances on Sunday was expressly upheld; and the prohibition of the sale of liquor on Sunday has been always recognized as the proper exercise of the power of Legislature. It is for the Legislature to say what trades or callings can be carried on with due regard to the observance of the Sabbath.

We think, therefore, that the act was clearly within the power of the Legislature, and that the conviction must be affirmed.

All concur.

NEW YORK SUPREME COURT. 73

PEOPLE OF THE STATE OF NEW YORK,
Plaintiff,

AGAINST

HENRY J. HAVNOR,
Defendant.

Please take notice, that the defendant, Henry J. Havnor, hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, First Department, entered February 7, 1896, in affirmance of the judgment of conviction rendered against defendant in the Court of Special Sessions on the 4th day of November, 1895, and from each and every part of said judgment and order. 74

Yours respectfully,

ALBERT I. SIRE,
Attorney for Defendant H. J. Havnor,
99 Nassau Street,
N. Y. City.

NEW YORK, Feb. 18, 1896.

75

TO JOHN R. FELLOWS, Esq.,
District Attorney.

76 NEW YORK SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents,

AGAINST

HENRY J. HAVNOR,
Appellant.

77 Pursuant to Section 3301 of the Code of Civil Procedure, we hereby stipulate that the foregoing is a copy of the case on appeal herein to the Appellate Division of the Supreme Court and of the whole thereof and of the order affirming the judgment appealed from, the notice of appeal to the Court of Appeals from the judgment affirmed, and of all the papers on which the appeal to the Appellate Division was heard including the opinion of said Appellate Division. And it is further stipulated that certification of the foregoing record be waived and that the appeal to the Court of Appeals be heard thereon.

Dated New York, February 25, 1896.

JOHN R. FELLOWS,
78 District Attorney.
ALBERT I. SIRE,
Defendant's Attorney.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

vs.

HENRY J. HAVNOR,
Appellant.

Decided April 14, 1896.

Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department, affirming a judgment of the Court of Special 80
Sessions for the City and County of New York, which convicted the defendant of carrying on the business of a barber on Sunday afternoon after one o'clock, in violation of Chapter 823 of the Laws of 1895.

In June, 1895, the defendant was engaged in business as a barber at number 57 West Thirty-third street, in the City of New York, and had been for the period of nine years. His establishment included "eleven ordinary chairs, three baths and two ladies' hair-dressing chairs." He kept his shop open on Sunday afternoon until eight o'clock, for the purpose of shaving his customers and cutting and dressing their hair. Some of his patrons, who worked 81
late Saturday night and rose late the next day, were in the habit of being shaved on Sunday afternoon as well as others, who could not shave themselves and yet desired to be shaved every day as a matter of cleanliness. On Sunday, June 9, 1895, after one o'clock in the afternoon, the defendant's shop was open and he was present while one of his employees shaved a customer, and payment for the service was made to the defendant in person.

No other material facts appeared upon the trial, which resulted in the conviction of the defendant, who was fined five dollars. The judgment was af-

firmed by the Appellate Division, and the defendant brought this appeal.

ALBERT I. SIRE, for Appellant.
JOHN D. LINDSAY, for Respondent.

VANN, *J.*—The main ground upon which the defendant asks us to reverse the judgment against him is that the statute under which he was convicted is in conflict with that provision of the Constitution which provides that "no person shall be deprived of life, liberty or property without due process of law" (Const., Art. 1, § 6). The statute in question, entitled "An act to regulate barbering on Sunday," provides that "any person who carries on or engages in the business of shaving, hair cutting or other work of a barber on the first day of the week shall be deemed guilty of a misdemeanor * * * provided that in the City of New York and the Village of Saratoga Springs barber shops * * * may be kept open and the work of a barber performed therein until one o'clock of the afternoon of the first day of the week" (L., 1895, Chap. 823).

The defendant claims that this statute deprives him to a certain extent of his "liberty," by preventing him from carrying on a lawful calling as he wishes, and also of his "property," by preventing the free use of his premises, tools and labor, and thus rendering them less productive. It is not claimed that his occupation is of a noisy nature, or that he so carried on his business as to disturb the peace, quiet and good order of the neighborhood, or that the act for which he was convicted, if done on any day of the week other than the first, or at any hour of that day prior to one o'clock in the afternoon, would have been a violation of law. Nor is it claimed that the conviction was authorized by the common law, or that it was based upon any statute except the one above cited, and, indeed, the judgment of the Court of Special Sessions expressly refers to that act and ad-

judges the defendant guilty of misdemeanor be- 85
cause he violated its command.

The phrase "due process of law" is not satisfied by a judgment pronounced, after an opportunity to be heard, by a court of competent jurisdiction in accordance with the provisions of a statute, unless that statute accords with the provisions of the fundamental law (*Wynehamer* v. *People*, 13 N. Y., 378, 393). In a broad sense, whatever prevents a man from following a useful calling is an invasion of his "liberty," and whatever prevents from freely using his lands or chattels is a deprivation of his "property" (*Bertholf* v. *O'Reilly*, 74 N. Y., 515; *In re Jacobs*, 98 N. Y., 98, 105). Yet, during the history of our State many laws have been passed which, to some 86
extent, have interfered with the right to liberty and property, but their accord with the Constitution has seldom been questioned, and, when questioned, has been generally sustained. The power of taxation, the right to preserve the public health, to protect the public morals and to provide for the public safety may interfere somewhat with both liberty and property, yet proper statutes to effect these ends have never been held to invade the guarantees of the Constitution. While the confinement of the insane or of those afflicted with contagious diseases infringes upon personal liberty, and the destruction of buildings to prevent the spread of fire, the exercise of the power of eminent domain and the prevention of cruelty to animals encroach upon the 87
right to property, still the proper exercise of these powers, under the authority of the Legislature, although constant and known of all men, gives rise to no question of moment under the Constitution. The sanction of these apparent trespasses upon private rights is found in the principle that every man's liberty and property is, to some extent, subject to the general welfare, as each person's interest is presumed to be promoted by that which promotes the interest of all. Dependent upon this principle is the great police power, so universally recognized,

but so difficult to define, which guards the health, the welfare and the safety of the public. While this power may not be employed ostensibly for the common good, but really for an ulterior purpose, when its object and effect are manifestly in the public interest, as was said in the *Jacobs* case, "it is very broad and comprehensive, and * * * under it the conduct of an individual and the use of property may be regulated so as to interfere, to some extent, with the freedom of the one and the enjoyment of the other" (p. 108). In the exercise of this power the Legislature has the right, generally, to determine what laws are needed to preserve the public health and protect the public safety, yet its discretion in this respect is not wholly without limit, for our courts have been steadfast in holding that the statute must have some relation to the general welfare; that the purpose to be reached must be a public purpose, and that "the law must in fact be a police law." Thus it has been held that "an act to improve the public health by prohibiting the manufacture of cigars and preparation of tobacco in any form in tenement houses in certain cases" (L. 1884, Chap. 272) was unconstitutional, because it did not tend to promote the public health, and that this was not the end actually aimed at (*In re Jacobs*, *supra*). For the same reason "An act to prevent deception in sales of dairy products" (L. 1881, Ch. 202), was declared to conflict with the Constitution, as it absolutely prohibited an innocent industry that was not fraudulently conducted, solely for the reason that it competed with another and might reduce the price of an article of food (*People* v. *Marx*, 99 N. Y., 377). When, however, the act was so changed as to make the substance accord with the title (L. 1885, Ch. 183), it was held to be constitutional (*People* v. *Arensburg*, 105 N. Y., 123). In a recent case, an act prohibiting the sale of any article of food upon the inducement that something would be given to the purchaser as a premium or reward (L. 1887, Ch. 691), was held to be an unauthorized invasion of the rights of property and an

improper exercise of the police power of the State. 91
(*People* v. *Gillson*, 109 N. Y., 389). It was expressly declared in that case that the courts must be able to see, upon a perusal of the enactment, that there is some fair, just and reasonable connection between it and the common good, and that unless such relation exists the statute cannot be upheld as an exercise of the police power.

Subject, however, to the limitation that the real object of the statute must appear, upon inspection, to have a reasonable connection with the welfare of the public, the exercise of the police power by the Legislature is well established as not in conflict with the Constitution (*Heisler* v. *Metropolitan Board of Health*, 37 N. Y., 661, 669; *Matter of Deansville* 92
*Cemetery Association*, 66 N. Y., 569; *In re Ryers*, 72 N. Y., 1, 7; *People ex rel. Kemp* v. *D'Oench*, 11 N. Y., 359; *People* v. *Ewer*, 141 N. Y., 129; *People ex rel. Nechamcus* v. *Warden, etc.*, 144 N. Y., 529; *Health Department* v. *Rector, etc.*, 145 N. Y., 432). When thus exercised, even if the effect is to interfere to some extent with the use of property, or the prosecution of a lawful pursuit, it is not regarded as an appropriation of property or an encroachment upon liberty, because the preservation of order and the promotion of the general welfare, so essential to organized society, of necessity involve some sacrifice of natural rights (*Phelps* v. *Racey*, 60 N. Y., 10, 14; *Prentice* v. *Weston*, 111 N. Y., 460).

The vital question, therefore, is whether the real pur- 93
pose of the statute under consideration has a reasonable connection with the public health, welfare or safety. The object of the act, as gathered from its title and text, was to regulate the prosecution of a particular trade on Sunday, by prohibiting it from being carried on as a business, on that day, except in two localities to which the prohibition applies only after a certain hour. It does not require the observance of the Sabbath as a holy day, or in any sense as a religious institution, as is evident from the fact that the entire day is left open to all secular employ-

94 ments but one, and a part of the day, in certain places, to that. There is nothing in the act to prevent the defendant from carrying on his trade "in any manner or in any place that he pleases. He is simply prohibited from carrying on that trade upon Sunday."

The peculiar character of the first day of the week, not simply on account of the obligations of religion, but as a day of rest and recreation, has been recognized for time out of mind both by the Legislature and the courts. Statutes passed upon the subject while we were a colony of Great Britain, as well as under the various Constitutions in force since our organization as a State, have, so far as appears,
95 been uniformly enforced by the courts (29 Car., II., c. 7; 2 Green., 89; Andrews, 467; 1 R. L., 194; 2 R. S., 675, § 70; L. 1788, Ch. 42; L. 1801, Ch. 34; L. 1847, Ch. 349; L. 1883, Ch. 358).

Similar laws in other States, and especially those which require the closing of places of business on Sunday, have generally been sustained (*People* v. *Ballot*, 39 Mich. 151; *Vogsang* v. *State*, 9 Ind., 112; *Shover* v. *State*, 10 Ark., 259; *Warne* v. *Smith*, 8 Conn., 14; *Bloom* v. *Richards*, 2 Ohio, 287; *Specht* v. *Commonwealth*, 8 Pa. St. 312; *Commonwealth* v. *Has*, 122 Mass., 40; *Bohl* v. *State*, 3 Tex. App., 683; Cooley's Cons. Lim. (5th Ed.) 589, 726; Tiedeman's Lim. of Police Power, 183; Hare's Am. Cons. Law, 766).

96 While questions have been raised as to noiseless and inoffensive occupations that can be carried on by one individual without requiring the services of others, as well as to persons who observe the seventh instead of the first day of the week, still the rule is believed to be general throughout the Union, although not generally enforced, that the ordinary business of life shall be suspended on Sunday, in order that thereby the physical and moral well-being of the people may be advanced. The inconvenience to some is not regarded as an argument against the constitutionality of the statute, as that is

an incident to all general laws. Sunday statutes have 97
been sustained as constitutional almost without exception, the most notable instance to the contrary, *Ex parte Newman* (9 Cal. 502), decided by a divided court in an early day in California, having been subsequently overruled by the courts of that State. (*Ex parte Andrews*, 18 Cal. 685; *Ex parte Koser*, 60 Cal., 202.)

The leading case in our own State upon the subject is that of *Lindenmuller* v. *People* (33 Barb. 548), in which Judge ALLEN discussed the common law as well as legislation affecting the Sabbath with great force and clearness. He held, in substance, that the body of the Constitution recognizes Sunday as a day of rest and an 98
institution to be respected, by not counting it as a part of the time allowed to the Governor for examining bills submitted for his approval; that the Sabbath exists as a day of rest by the common law without the necessity of legislative action to establish it; and that the Legislature has the right to regulate its observance as a civil and political institution. That case was expressly approved in *Neuendorff* v. *Duryea* (69 N. Y., 557, 561, 563) and was referred to as one "which has never been questioned in a court of higher or equal authority," and "as declaring the law of this State." It was cited with approval in *People* v. *Moses* (140 N. Y., 214, 215), where Judge EARL, speaking for a majority of the 99
Court, said: "The Christian Sabbath is one of the civil institutions of the State, and that the Legislature for the purpose of promoting the moral and physical well-being of the people and the peace, quiet and good order of society, has authority to regulate its observance and prevent its desecration by any appropriate legislation is unquestioned." While works of charity and necessity have usually been excepted from the effect of laws relating to the Sabbath, and sometimes, also, those persons who keep another day of the week, still quiet pursuits have not, even when they can be carried on

100 without the labor of others, because general respect and observance of the day, so far as practicable, have been deemed essential to the interest of the public, including as a part thereof those who prefer not to keep the day, as their health and morals are entitled to protection, even against their will, the same as those of any other class in the community. According to the common judgment of civilized men, public economy requires, for sanitary reasons, a day of general rest from labor, and the day naturally selected is that regarded as sacred by the greatest number of citizens, as this causes the least inconvenience through interference with business. (*Lindenmuller* v. *People*, *supra*.)

101 It is to the interest of the State to have strong, robust, healthy citizens, capable of self-support, of bearing arms, and of adding to the resources of the country. Laws to effect this purpose, by protecting the citizen from overwork and requiring a general day of rest to restore his strength and preserve his health, have an obvious connection with the public welfare. Independent of any question relating to morals or religion, the physical welfare of the citizen is a subject of such primary importance to the State, and has such a direct relation to the general good, as to make laws tending to promote that object proper under the police power, and hence valid under the Constitution, which "presupposes its ex-

102 istence, and is to be construed with reference to that fact." (*Village of Carthage* v. *Frederick*, 122 N. Y., 268, 273.)

The statute under discussion tends to effect this result, because it requires persons engaged in a kind of business that takes many hours each day to refrain from carrying it on during one day in seven. This affords an opportunity, recurring at regular intervals, for rest, needed both by the employer and the employed, and the latter, at least, may not have the power to observe a day of rest without the aid of legislation. As Mr. Tiedeman says in his work on Police Powers: "If

the law did not interfere, the feverish, intense desire 103
to acquire wealth, * * * inciting a relentless rivalry and competition, would ultimately prevent not only the wage-earners, but likewise the capitalists and employers themselves, from yielding to the warnings of nature and obeying the instinct of self-preservation by resting periodically from labor" (Tiedeman's Lim. Police Powers, 181). As barbers generally work more hours each day than most men, the legislature may well have concluded that legislation was necessary for the protection of their health.

We think that this statute was intended and is adapted to promote the public health, and thereby to serve a public purpose of the utmost importance 104
by promoting the observance of Sunday as a day of rest. It follows, therefore, that it does not go beyond the limits of legislative power by depriving any one of liberty or property within the meaning of the Constitution.

The learned counsel for the defendant, however, criticises the act in question as class legislation, and claims that it is invalid under the fourteenth amendment to the Constitution of the United States, because it denies to barbers who do not reside in New York or Saratoga the equal protection of the laws. That amendment does not relate to territorial arrangements made for different portions of a State, nor to legislation which, in carrying out a public 105
purpose, is limited in its operation, but within the sphere of its operation affects alike all persons similarly situated (*Missouri* v. *Lewis*, 101 U. S., 22, 30; *Barbier* v. *Connolly*, 113 U. S., 27, 31). It was not designed to interfere with the exercise of the police power by the State for the protection of health, or the preservation of morals (*Powell* v. *Pennsylvania*, 127 U. S., 678, 683). The statute treats all barbers alike within the same localities, for none can work on Sunday outside of New York and Saratoga, but all may work in those places until a certain hour. All are, therefore, treated alike under like circum-

106 stances and conditions, both in the privileges conferred and in the liabilities imposed (*Hayes* v. *Missouri*, 120 U. S., 68). As was said by the learned Appellate Division in deciding this case: "If the Legislature has power to regulate the observance and prevent the desecration of the Sabbath, it has the power to say what acts in the different localities of the State it is necessary to prohibit to accomplish this purpose. It is quite conceivable that an act in one locality, thickly settled, should be prohibited which in sparsely settled districts of the State could be allowed, and for this reason an act might be objectionable in one district, but not in another. All of these regulations have in view the proper observ-
107 ance of the day, a .d are within the discretion of the Legislature."

We think that the statute violates no provision of either the Federal or State Constitution, and that the judgment appealed from should, therefore, be affirmed.

GRAY, *J.* (dissenting). This enactment can only find its justification, in my opinion, in an attempted exercise of the police power of the State. I cannot suppose that it is to be defended as a proper or reasonable extension of the "Sunday law" of the State. That law includes in the works of necessity, which it permits, "whatever is needful for the good
108 order, health or comfort of the community." The occupation of the barber has not been deemed unlawful under it, and it would look like a relapse into the narrow groove of earlier Puritanical belief if we should now regard it as inconsistent with the due observance of the Sabbath day. Conceding, as I do, to the Legislature a wide range in the exercise of what is known as the police power, I think that, in this piece of legislation, it has overstepped the limits and has infringed upon the constitutional guarantees, which, in effect, assure to us the enjoyment of our liberty and of our property in all reasonable ways. While it has been frequently ob-

served that it is difficult to define the limits of the police power of the State, it is, nevertheless, agreed that an enactment in that direction must be one having reference to the comfort, the safety or the welfare of society. A line of decisions in the Federal and State Courts has erected these as monuments to denote the boundaries of this extraordinary power which is deemed to reside in the legislative agents of the people of the State. We know that this power is not above the Constitution; but that it is subject to it, and when legislation violates any of its provisions, in the letter or the spirit, it is the duty of the Courts, upon the faithful performance of which the people confidently rely, to interpose the barrier of their judgments against its enforcement. Under the constitutional guaranty every one is at liberty to follow any lawful avocation which is not injurious to the community, and to enjoy its fruits, and any interference by the Legislature, under the guise of a police regulation, must be seen by the Court to have some real reference to the common good. The mere declaration of the Legislature is not conclusive. It cannot seriously be said that the defendant's business is one that conflicts with the comfort, safety or welfare of the community when carried on upon the first day of the week, called Sunday. It is in its nature a peaceable occupation, and, as usually conducted, cannot and does not interfere with the quiet of the day, or with the performance by any citizen of the duties of the day, however appointed. It is one that not merely conduces to the comfort of the individual, but promotes his decent appearance as a member of the community, and it is quite impossible to conceive of the business as in any reasonable way militating against the requirements of society with respect to the Sabbath day.

109 110 111

The learned Justices of the Appellate Division have thought that it is discretionary with the Legislature to enact laws for the regulation of the observance of the Sabbath. That discretion does exist, so far as to prevent what is, or amounts to, a desecra-

112 tion of the day, as was decided in *People* v. *Moses* (140 N. Y., 215); but it should not be deemed to exist, so far as to interfere with a peaceable calling, and more or less necessary to the comfort and decency of members of the community.

But this legislation, in my judgment, is particularly objectionable and deserving of judicial condemnation, for the reason that it discriminates unreasonably in dealing with those who are engaged in the pursuit of a lawful avocation. It certainly must be implied in our governmental system that legislation shall be equal as to all and just in its commands. If that were not so, government by the people for the people would exist but in name. The
113 fundamental guarantees, on which rest our social structure, would be delusive. The Legislature cannot act arbitrarily, and if this act is to be defended as a proper exercise of the police power, then it is without shadow of excuse, in discriminating against barbers who do not reside in the City of New York, or in the Village of Saratoga Springs. Legislation which discriminates in this wise is not in harmony with the idea of our democratic form of government. Where it touches the pursuit by individuals of a lawful avocation it should act with impartial hand, affecting all alike and subjecting every one interested to the same restraints for the sake of the common good. There is no sensible or plausible
114 reason for the discrimination made by this law. It is unnecessary, unreasonable and hostile to the true policy of the State. Regarded as an exercise of the police power it cannot be justified as either necessary for the good of society, or as conducive to its welfare; and it is violative of constitutional principles, in that it restrains unduly and unequally the liberty of those engaged in a lawful business.

I think the judgment should be reversed and that the defendant should be discharged.

BARTLETT, *J.* (dissenting). While this Court has very properly held that the Christian Sabbath is one of the civil institutions of the State and that the

Legislature may regulate its observance and prevent 115
its desecration (*People* v. *Moses*, 140 N. Y., 214), I think the case at bar presents an instance where the lawmakers have overstepped the bounds of legitimate legislation in the alleged exercise of the police power. Chapter 823, Laws of 1895, provides substantially that any person who engages in the business of a barber on the first day of the week shall be deemed guilty of a misdemeanor, provided that in the City of New York and the Village of Saratoga Springs barber shops may be kept open until one o'clock of the afternoon of the first day of the week.

The Penal Code provides (§ 263) that all labor on Sunday is prohibited, excepting the works of neces- 116
sity or charity.

These works are then defined as including "whatever is needful during the day for the good order, health or comfort of the community." The Legislature by permitting barber shops to remain open for a portion of the first day of the week in two localities of the State necessarily proceeded upon the theory that the business of the barber is a work of necessity contributing to the comfort of the community.

I think it clearly within the power of the Legislature, in order to regulate the observance of the Sabbath, to control the hours during which a barber shop may be kept open on the first day of the week 117
even if the comfort of the community may be to some extent interfered with in so doing.

This principle is recognized by the Penal Code (§ 267), which prohibits the public sale of any property upon Sunday, but allows articles of food to be sold and supplied before ten o'clock in the morning and certain articles of personal property to be sold during the entire day.

If then the business of the barber is work of necessity contributing to the comfort of the community, can it be a reasonable exercise of the police power to arbitrarily extend the comfort of a Sunday morning

118 shave to the inhabitants of the City of New York and the Village of Saratoga Springs and deny it to the rest of the State including great cities like Brooklyn and Buffalo?

I think the act under consideration is vicious class legislation and in direct violation of the fourteenth amendment of the Constitution of the United States, which provides that no State "shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The act is, in my judgment, a specimen of grotesque and absurd legislation resting upon no principle of public policy and utterly indefensible
119 under any reasonable or proper exercise of the police power.

The Supreme Court of the United States has held that the fourteenth amendment does not impair the police power of a State (*Barbier* v. *Connolly*, 113 U. S., 27), and it has further decided that it does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is operated (*Hayes* v. *Missouri*, 120 U. S., 68, 71). There is, however, nothing in these adjudications which will sustain the act under consideration. In the exercise of the police power the Legislature is vested with the amplest discretion, the precise limits of which cannot be accurately de-
120 fined, but there is a point beyond which that discretion cannot be exercised.

The language of Judge PECKHAM in delivering the opinion of this Court in *People* v. *Gillson* (109 N. Y., at page 401), is apposite. The learned judge, referring to the *Matter of Jacobs* (98 N. Y., 98), said: "As is also said in the last case, it is generally for the Legislature to determine what laws and regulations are needed to protect the public health and serve the public comfort and safety, and if its measures are calculated, intended, convenient or appropriate to accomplish such ends the exercise of its discretion is not the subject of

judicial review. But those measures must have 121
some relation to these ends. Courts must be able to see, upon a perusal of the enactment, that there is some fair, just and reasonable connection between it and the ends above mentioned. Unless such relation exist the enactment cannot be upheld as an exercise of the police power."

Can it be said, after a perusal of the act in question, that its provisions are a reasonable and proper exercise of the police power?

I think not; it is an arbitrary, discriminating exercise of that power which ought not to be tolerated.

The good offices of the barber, being a work of necessity needful on Sunday for the comfort of the 122
community, should be extended to all portions of the State alike.

It is true the Legislature might allow the barber shops to remain open longer on Sunday in a great city than in a country village, but subject to reasonable regulation as to hours all barbers and their customers are entitled to the equal protection of the laws.

The claim that the work of the barber is one of necessity, needful during the early hours of Sunday for the comfort of the community, rests upon years of practical construction of the various laws regulating the observance of the Sabbath.

I think that chapter 823, Laws of 1895, is void as 123
violating the fourteenth amendment of the Constitution of the United States, and for the further reason that it is not a proper exercise of the police power.

The judgment appealed from should be reversed.

All concur, with VANN, *J.*, for affirmance, except GRAY and BARTLETT, *JJ.*, who dissent, each reading for reversal, and HAIGHT, *J.*, who concurs in both dissenting opinions.

Judgment affirmed.

(A copy.)

E. H. SMITH,

Reporter C.

124 COURT OF APPEALS.

State of New York, ss.:

Pleas in the Court of Appeals, held at the Capitol, in the City of Albany, on the 14th day of April, in the year of our Lord one thousand eight hundred and ninety-six, before the Judges of said Court.

Witness—The Hon. CHARLES ANDREWS,
Chief Judge, presiding.

125 GORHAM PARKS,
Clerk.

Remittitur, April 14, 1896.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents,

AGAINST

HENRY J. HAVNOR,
Appellant.

126 Be it remembered that on the twenty-seventh day of February, in the year of our Lord one thousand eight hundred and ninety-six, Henry J. Havnor, the appellant in this action, came here into the Court of Appeals, by Albert I. Sire, Esq., his attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the Appellate Division of the Supreme Court, First Department.

And the People of the State of New York, the respondents in said action, afterwards appeared in said Court of Appeals, by John R. Fellows, Esq., their District Attorney.

Which said notice of appeal and the return thereto 127
filed as aforesaid, are hereunto annexed.

Whereupon the said Court of Appeals having heard this cause argued by Mr. Albert I. Sire, of counsel for the appellant, and by Mr. John D. Lindsay, Assistant District Attorney, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the Supreme Court appealed from in this action be in all things affirmed.

And it was also further ordered that the record aforesaid and the proceedings of this Court, be remitted to the said Supreme Court of the First Department, there to be proceeded upon according to law.

128

Therefore it is considered that the said judgment be in all things affirmed as aforesaid, and stand in full force, strength and effect.

And hereupon as well as the notice of appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the First Department before the Justices thereof according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justice thereof, &c.

GORHAM PARKS,
Clerk of the Court of Appeals of
the State of New York.

129

COURT OF APPEALS, CLERK'S OFFICE, }
ALBANY, April 14, 1896. }

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein attached thereto.

GORHAM PARKS,
Clerk.

[SEAL.]

130 At a Special Term of the Supreme Court, held in and for the City and County of New York, at the City Hall in the City of New York, on the 20th day of April, in the year of our Lord one thousand eight hundred and ninety-six.

Present—The Honorable FREDERICK SMYTH, *Justice.*

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents,

131 AGAINST

HENRY J. HAVNOR,
Appellant.

Order on Remittitur.

Whereas, heretofore, to wit, at a term of the Court of Special Sessions, begun and holden in and for the City and County of New York, at the Criminal Courts Building in said city, on the first Monday of November, in the year of our Lord one thousand eight hundred and ninety-five, to wit, on the 4th day of November in the year aforesaid, the
132 above named appellant was in due form of law convicted of a misdemeanor, whereupon, to wit, on the said 4th day of November it was considered by the Court and ordered and adjudged, that the said appellant, for the misdemeanor aforesaid whereof he was so convicted as aforesaid, pay a fine of five dollars;

And whereas, the appellant aforesaid thereafter duly appealed from the said judgment to the Supreme Court, Appellate Division, of the State of New York;

And whereas, at a term of the said Appellate Division of the Supreme Court, held in and for the

45 first judicial department, to wit, at the court-house thereof in the city of New York on the seventh day of February, in the year of our Lord one thousand eight hundred and ninety-six, the said judgment of the said court of special sessions was by the judgment of the said appellate division of the supreme court in all things affirmed;

And whereas, the appellant aforesaid thereafter duly appealed from the said judgment of the appellate division to the court of appeals of the State of New York;

And whereas, at a term of the said court of appeals, held at the capitol in the city of Albany, on the 14th day of April, in the year of our Lord one thousand eight hundred and ninety-six, the said judgment of the said appellate division was by the judgment of the said court of appeals in all things affirmed, and the record herein, and the proceedings in the said last-mentioned court upon the said appeal, were by the said judgment remitted to this court, there to be proceeded upon according to law, as by the remittitur of the said court of appeals now on file in this court more fully appears;

Now, therefore, on reading and filing the said remittitur, and on motion of John R. Fellows, Esq., district attorney, it is

Ordered, that the said judgment of the said court of appeals be and the same is hereby made the judgment of this court; and it is further

Ordered, that the said judgment of the said court of special sessions so appealed from as aforesaid and so affirmed, and the said judgment of the appellate division of the supreme court herein, be and the same are hereby directed to be enforced and carried into execution and effect.

FREDERICK SMYTH, *J. S. C.*

46 All which we have caused by these presents to be exemplified and the seal of our said supreme court to be hereunto affixed.

Witness Hon. F. Smyth, a justice of the supreme court for the city and county of New York, the twenty-seventh day of April, in the year of our Lord one thousand eight hundred and ninety-six, of our Independence the one hundred and twentieth.

[SEAL OF NEW YORK.] HENRY D. PURROY, *Clerk.*

I, F. Smyth, a presiding justice at a special term of the supreme court of the State of New York for the city and county of New York, do hereby certify that Henry D. Purroy, whose name is subscribed to the preceding exemplification, is the clerk of the said county of New York and clerk of said supreme court for said county, duly elected and sworn, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said supreme court, and that the attestation thereof is in due form.

Dated New York, April 27th, 1896.

F. SMYTH,
*Justice of the Supreme Court of the State of New York.*

STATE OF NEW YORK, } ss:
*City and County of New York,* }

I, Henry D. Purroy, clerk of the supreme court of said State in and for the city and county of New York, do hereby certify that Hon. F. Smyth, whose name is subscribed to the preceding certificate, is presiding justice at chambers of the supreme court of said State in and for the city and county of New York, duly elected and sworn, and that the signature of said justice to said certificate is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court this 27th day of April, 1896.

[SEAL OF NEW YORK.] HENRY D. PURROY, *Clerk.*

47 Due service of a copy of within writ and citation admitted.
N. Y., August 6, 1896.

JOHN R. FELLOWS,
*District Attorney.*

In the Supreme Court of the United States.

*Ex Parte* HAVNOR, Petitioner.

*Petition for Writ of Error, &c.*

Albert I. Sire, attorney for petitioner, 99 Nassau street, New York.

48 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the supreme court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, between The People of the State of New York, plaintiff, and Henry J. Havnor, defendant, a manifest error is said to have happened, to the great damage of the said Henry J. Havnor, as appears by his petition, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Seal of U. S. Circuit Court, South. Dist. New York.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 6th day of August, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN A. SHIELDS,
*Clerk Circuit Court of the United States for the Southern District of New York.*

The foregoing writ is hereby allowed.

EDWARD T. BARTLETT,
*Asso. Judge N. Y. Court of Appeals.*

49 UNITED STATES OF AMERICA, *ss:*

To the People of the State of New York:

You are hereby cited and admonished to appear at a term of the United States Supreme Court, to be held at the Capitol, in Washington, D. C., on the second day of September, one thousand eight hundred and ninety-six, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Henry J. Havnor is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties.

New York, August 6th, 1896.

EDWARD T. BARTLETT,
*Associate Judge Court of Appeals, State of New York.*

50 Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK, Defendant in Error,
*against*
HENRY J. HAVNOR, Plaintiff in Error.

*Assignment of Errors.*

Afterward, to wit, on the — day of ——, 1896, before the justices of the court of appeals of the State of New York, the plaintiff in error says that in the record and proceedings of the above-entitled cause there was manifest error committed, in this:

That whereas heretofore an act was passed by the legislature of the State of New York, which is now in force, entitled chapter 823 of the Laws of 1895, which provided as follows:

"An act to regulate barbering on Sunday.

"SECTION 1. Any person who carries on or engages in the business of shaving, hair-cutting or other work of a barber on the first day of the week, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than five dollars and upon a second conviction for a like offense shall be fined not less than ten dollars and not more than twenty-five dollars, or be im-

prisoned in the county jail for a period of not less than ten days nor more than twenty-five days or be punishable by both such fine and such imprisonment at the discretion of the court or magistrate
51 provided that in the city of New York and the village of Saratoga Springs, barber shops or other places w-ere a barber is engaged in shaving, hair-cutting or other work of a barber may be kept open and the work of a barber may be performed therein until one o'clock of the afternoon of the first day of the week."

"SECTION 11. This act shall take effect on the first day of June, 1895."

That whereas on the 9th day of June, 1895, plaintiff in error was arrested by the direction of the police authorities of New York city on the charge of violating said act on the day of the arrest (Sunday) by keeping open shop after one p. m., on which charge petitioner was afterward, on the fourth day of November, 1895, tried and fined five dollars by the court of special sessions in New York city, which was paid under protest and an appeal taken from the judgment of conviction to the appellate division of the supreme court of the State of New York, first department, where said conviction was affirmed on the seventh day of February, 1896, and on a second appeal to the court of appeals of the State of New York said conviction was again affirmed by a divided court, which stood four for and three against affirmance, and decisions rendered on the 14th day of April, 1896;

And whereas plaintiff in error contended before said court that said conviction was illegal because the same was violative of the fourteenth amendment of the Constitution of the United States, providing that "no person shall be deprived of life, liberty, or property without due process of law," and of the corresponding clause in the constitution of the State of New York. (See art. 1, sec. 1.) That said court of appeals by said decision and by the judgment entered in pursuance thereof in the supreme court of the State of New York decided, against the contention of the plaintiff in error, that said conviction was valid, and that the said chapter 823 of the Laws of 1895 was not at variance with the Constitution of the United
52 States or of the State of New York and was a proper exercise of the police power of the State of New York, wherein was error, as is contended, in that by the law of the land the said judgment ought to have been given for the said Henry J. Havnor against the defendant in error on the ground that said chapter 823 aforesaid of the Laws of 1895 of the laws of New York is unconstitutional; so that plaintiff in error prays that such judgment and order aforesaid be reversed, annulled, and held *for* nothing, and that he may be restored to all things he hath lost by reason of the said judgment of the said court of appeals.

N. Y., June 23, 1896.

ALBERT I. SIRE,
*Attorney for P'ff in Error.*

53 Supreme Court of the State of New York, City and County of New York.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff,
*vs.*
HENRY J. HAVNOR, Defendant.

Know all men by these presents that we, Henry J. Havnor, as principal, and William J. Devlin, as surety, of the city of New York, are held and firmly bound unto the above-named The People of the State of New York in the sum of two hundred & fifty dollars, to be paid to the said The People of the State of New York; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 23rd day of June, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas the above-named Henry J. Havnor has applied to the court of appeals of the State of New York for a writ of error to the Supreme Court of the United States from a judgment of the N. Y. supreme court, entered April 20th, 1896, on a remittitur from the New York court of appeals, dated April 14th, 1896, affirming a judgment convicting plaintiff in error of a violation of chapter 823 of the Laws of 1895, to reverse the said judgment entered in the above-entitled suit:

Now, therefore, the condition of this obligation is such that if the above-named defendant shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his ap-
54 peal good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

WM. J. DEVLIN. [SEAL.]
H. J. HAVNOR. [SEAL.]

Sealed and delivered and taken and acknowledged this 7th day of July, 1896, before me—
WARREN S. BURT,
*Notary Public, N. Y. Co.*

STATE OF NEW YORK,
*City and County of New York.*

William J. Devlin, being duly sworn, deposes and says that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

WM. J. DEVLIN.

Sworn to this 7th day of July, A. D. 1896, before me—
D. S. VOORHEES,
*Comm'r of Deeds, City & Co. of N. Y.*

Bond approved.

EDWARD T. BARTLETT,
*Asso. Judge N. Y. Court of Appeals.*

New York, July 30, 1896.

55 In the Matter of the Petition of HENRY HAVNOR for Writ of Error.

CITY AND COUNTY OF NEW YORK, *ss.*:

Albert I. Sire, being duly sworn, says that he is attorney for Henry Havnor, the petitioner herein; that deponent is informed and believes that Hon. Charles Andrews, chief judge of the court of appeals of the State of New York, is now abroad in Europe, and will be for some space of time to come; that the sources of deponent's information are derived from a recent letter received from the clerk of the court of appeals, Gorham Parks, Esq.

ALBERT I. SIRE.

Sworn to before me this 29th day of July, 1896.

MEYER GREENBERG,
*Notary Public* (59), *N. Y. Co.*

Endorsed on cover: Case No. 16,375. New York supreme court. Term No., 227. Henry J. Havnor, plaintiff in error, *vs.* The People of the State of New York. Filed September 2, 1896.

No. 596 227.
Motion Papers for P. E.
Filed Sept. 26, 1896.



# In the Supreme Court of the United States.

596

THE PEOPLE OF THE STATE OF NEW YORK,
*Defts. in Error,*

*vs.*

HENRY J. HAVNOR,
*Plff. in Error.*

## MOTION TO ADVANCE CAUSE.

ALBERT I. SIRE,
*Attorney for Plff. in Error,*
99 Nassau Street, New York.

Appeal Printing Company, 20 Vesey St., New York.

# Supreme Court

OF THE UNITED STATES.

THE PEOPLE OF THE STATE OF NEW YORK,
Defendants in Error,

against

HENRY J. HAVNOR,
Plaintiff in Error.

To JOHN R. FELLOWS, Esq.,
District Attorney of New York County.

Sir:

You will please take notice that upon the annexed affidavit of Albert I. Sire, and upon the record attached to the writ of error and accompanying papers in this action all filed in the office of the Clerk of the Supreme Court of the United States on or about the 8th day of August, 1896, the undersigned will move this Court at the next term thereof to be held at the Capitol in the City of Washington, D. C., on the 2d Monday of October, 1896, at 10.30 o'clock in the forenoon, for an order preferring this cause on the calendar and setting the same down for a hearing on a day certain.

Dated New York, September 22d, 1896.

Yours, &c.,
ALBERT I. SIRE,
Attorney for Plaintiff in Error.
99 Nassau Street,
New York City.

4 SUPREME COURT OF THE UNITED STATES.

THE PEOPLE OF THE STATE OF NEW YORK,
Defendants in Error,

against

HENRY J. HAVNOR,
Plaintiff in Error.

United States of America,
State of New York,
5 City and County of New York, } ss.:

Albert I. Sire, being duly sworn, says that he is the attorney for Henry J. Havnor, the above-named plaintiff in error. That the above-entitled case stands docketed in this Court upon writ of error heretofore granted by a judge of the Court of Appeals of the State of New York, by which the case has been removed to this Court from the Supreme Court of the State of New York. That the plaintiff in error, Henry J. Havnor, has taken the appeal by said writ of error to this Court in order to obtain a review of a certain judgment rendered against him in a criminal action based upon the
6 alleged violation by said Henry J. Havnor of Chapter 823 of the Laws of the State of New York for 1895, by which all barbers are prohibited from plying their trade on Sunday excepting in New York City and Saratoga Springs, where they are allowed to do business until one o'clock of that day. The record in this action will directly bring before this Court for determination a question of great public interest and importance to the people of the State of New York, inasmuch as this Court will be asked to decide a constitutional question upon which the Court of Appeals of the State of New

York have passed by a nearly equally divided vote 7
adversely to the plaintiff in error. The facts and circumstances of the case will more fully appear by an examination of the petition of Henry J. Havnor, annexed to the record filed with the clerk of this Court on or about August 8th, 1896, to which reference is hereby made as being the grounds for this motion. That plaintiff in error as well as all other barbers in New York State suffer irreparable damage while said statute remains in force.

That deponent desires to obtain on behalf of the plaintiff in error a preference on the calendar of this Court in order that the rights of the said plaintiff in error, as well as those of all other citizens of 8
the State of New York, similarly situated, may be speedily determined and to that end plaintiff in error makes this motion under Rule 26 of the Supreme Court which provides that in criminal actions where questions to be determined are constitutional ones or of public importance the Court may advance the case out of its order upon the calendar for speedy hearing.

Sworn to before me this )
day of September, 1896. )

9

No. 227.

Brief of Sire for P. E.



Supreme Court of the United States,

OCTOBER TERM, 1897.

Filed Jan. 3, 1898.

No. 227.

HENRY J. HAVNOR,
*Plaintiff in Error,*

*vs.*

THE PEOPLE OF THE STATE OF NEW YORK.

In Error to the Supreme Court of the State of New York.

# BRIEF FOR PLAINTIFF IN ERROR.

ALBERT I. SIRE,
*Attorney for Plaintiff in Error.*

# Supreme Court of the United States.

HENRY J. HAVNOR,
Plaintiff in Error,
*against*
THE PEOPLE OF THE STATE OF NEW YORK.

**Points for Plaintiff in Error.**

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

## Statement of the Case.

This is an appeal on writ of error by Henry J. Havnor from a judgment of the Supreme Court of the State of New York entered on a remittitur from the N. Y. Court of Appeals which affirmed a judgment of the Supreme Court after an appeal to the Appellate Division thereof, from a judgment of the Court of Special Sessions of the City and County of New York, rendered November 4th, 1895, convicting Havnor of a violation of Chapter 823 of the Laws of 1895, commonly called the "Collins' Act," and fining him the sum of five dollars. This Act reads as follows:

"An Act to regulate barbering on Sunday.
"Section I. Any person who carries on or en-
"gages in the business of shaving, hair cutting or
"other work of a barber on the first day of the
"week shall be deemed guilty of a misdemeanor

" and upon conviction thereof shall be fined not " more than five dollars and upon a second convic- " tion for a like offense shall be fined not less than " ten dollars and not more than twenty-five dollars " or be imprisoned in the County Jail for a period " of not less than ten days nor more than twenty- " five days or be punishable by both such fine " and such imprisonment at the discretion of the " Court or Magistrate, provided that in the City of " New York and the village of Saratoga Springs, " barber shops or other places where a barber is " engaged in shaving, hair cutting or other work " of a barber may be kept open and the work of " a barber may be performed therein until one " o'clock of the afternoon of the first day of the " week.

" Section II. This Act shall take effect on the " first day of June, 1895."

This appeal is in the nature of a test case, to decide whether the Act is a constitutional exercise of legislative power.

Upon the trial the defendant testified uncontradicted to several facts, material as we believe to a proper legal construction of the Act.

These facts are *First:* That defendant's shop on Sunday enjoyed the patronage of a great many men who made it their practice to indulge in late rising on Sunday morning—a custom that very generally obtains—and who owing to this habit were not able to reach defendant's shop to be shaved or take a bath until oftentimes one o'clock or after. *Second:* That many of such customers resorted *daily* to defendant's shop, in consequence of the rapidity with which their beards grew; and *Third:* that many of them were unable to shave themselves, and that as to such, defendant's services became not only a matter of decency and convenience but even of positive necessity in the after-

noon of each Sunday after one o'clock, after which time the law forbade him to remain open or to ply his trade under any circumstances.

After this testimony defendant's counsel upon the grounds hereinafter set forth argued that Chapter 823, Laws of 1895, was unconstitutional and void and moved defendant's discharge. This was denied and the defendant found guilty and an exception duly taken, fined five dollars, which was paid under protest after which an appeal was taken to the Appellate Division where judgment was affirmed, after which an appeal was taken to the N. Y. Court of Appeals where by a divided Court standing four to three the judgment was also affirmed, and now the plaintiff in error appeals to this Court by writ of error to finally have determined the constitutionality of the Act in question.

Defendant's objections to the validity of the said Law are as follows :

## POINT I.

**The Act is void under Article I. of the constitution of this State, which provides that "no person shall be "deprived of life, liberty or prop- "erty, without due process of law."**

(See Art. 1. Sec. 1.)

**It is void, not only under this clause of the State Constitution, but under the rights guaranteed by the Constitution of the United States to the citi-**

**zens of the several States, where Section I. of the 14th Amendment says, "nor shall any State deprive "any person of life, liberty or prop- "erty without due process of law nor "deny to any person within its juris- "diction the equal protection of its "laws."**

**It is void because it is an unwarrantable exercise of the Police power of the State, and operates to the injury of the defendant in his business not only without the least tendency to promote the good order, health or comfort of the community, but because it contributes directly to its discomfort and inconvenience.**

On the threshold of this discussion we feel confident in stating as a result of research, that in our belief no case but this has yet arisen under the Sunday Law of the State of New York where the question has been passed upon by the Court of last resort whether barbering is a "work of necessity" so as not to fall within the inhibition against Sunday labor.

If we are correct, the decision of this case bids fair to be one "of first impression," so far at least as the State of New York is concerned.

The General law of New York State hitherto in effect and commonly called the "Sunday Law" passed as amended by Chapter 358 of Laws of 1883, reads as follows, as bearing on our point :

"All labor on Sunday is prohibited, excepting "works of *necessity or charity*. In works of

"necessity or charity is included whatever is "*needful for the good order, health or comfort of* "*the community.*"

Now before this late Act prohibiting the exercise of a barber's trade on Sunday, we think that no one has ever thought barbering was anything else than a work of necessity within the definition of the Law of 1883, or that it was not in every way "needful for the good order, health or comfort of the community."

But the good people of New York State have been treated to a genuine surprise by this new law, which overrides the general sentiment, proscribes Sunday barbering, and in effect pronounces it an act not administering to the people's comfort and convenience.

Assuming therefore that barbering has not hitherto been a violation of the Sunday law the latter is now in effect repealed by implication in so far as concerns the barber's trade. And with what reason? Have barber shops suddenly become places where disturbances abound, where disorderly people resort to break the peace of the Sabbath day and offend the general sense of decency and desire for repose? Surely on this score barber shops cannot have suddenly become offending causes. Who ever heard of a barber shop as a haunt for disorderly characters? Who ever thinks of a barber shop as a place of noise or revel? Who remembers it in his experience as a place where aught but peace reigns, broken only by the busy sound of the scissors, the scrape of the razor or a scrap of quiet conversation. In short it would be simply absurd to urge as a reason for closing barber shops on Sunday that they encouraged noise.

On what ground then can the sudden hostility entertained against them by our lawmakers be ex-

plained ? Can it be said they are unhealthy ? That would be too idle to discuss. Can they be said in any way to have an immoral tendency? Too absurd to claim.

Does one ever go to a barber shop to gamble, to drink, to indulge in ribaldry, or any of the various forms of vice ? The thing is unheard of, except that maybe a barber shop occasionally suffers in this respect in common with all other places of most perfect respectability. We never heard of a barber shop made the subject of attack on this score. Taking the world over, was there ever a more inoffensive resort than a barber shop ? Is there a place that is less associated with what is concededly bad ? Is there, in short, a place that from the earliest keeping of shops in civilized communities, has maintained in greater degree a more respectable character ?

On the other hand can we point to a bodily attention, which is so grateful, comfortable and needful than that derived from the ministration of a barber ? His performance of your toilet is not merely a luxury. In modern as well as ancient civilization, in civilized as well as savage communities his services have always been in request as *an absolute necessity*. The barber's office is not alone one which tends to improve the personal appearance, but submitting to his hands is a distinctively cleanly act, and if cleanliness is next to Godliness it surely cannot be more reprehensible to repair to your barber to be shaved on Sunday, than to take a bath at your home and to shave yourself on that day.

What shall be said of a law that not only fines and imprisons the unhappy craftsman for aiding his patrons to assume a decent Sunday exterior within the precincts of his shop, but which forsooth subjects him to pains and penalties *for even visiting a customer's house* and there removing the facial growth or shearing his locks ! !

For grotesque and ridiculous as it may appear, such a deed is made by this precious statute an offense as great as when the barber welcomes his customer to the chair in his shop. Truly such a law is a reproach to the enlightened age in which we live, and takes us in imagination back to medieval times, when the length of one's shoes and the dimensions of one's hat or frock were deemed proper subjects for legislative interference.

It may be said in answer to our argument for Sunday barbering, viewed as a necessity, that it cannot be such, because a man may visit his barber on Saturday night, or in New York City, he may arise at his customary week-day hour and have his shaving and trimming over with by the closing hour of one P. M. This will not serve in reply, because with a large class of persons the confirmed habit obtains of indulging in protracted rest on Sunday morning, which no one will pretend to say is not salutary and necessary to recoup the wearied frame of man from the exhaustive labors of the past week and prepare it for renewed effort in that to come.

With such as find it necessary thus to arise at a late morning hour and who naturally take their first meal at nearly noon, will it be said that a visit to their barber afterward even though it be after the hour of one o'clock is not as absolutely necessary and as much justified as the earlier morning visit of the man who is an earlier riser ?

The defendant has made it appear that his customers on Sunday are chiefly of the leisurely sort to which we have referred.

Shall we conclude that the legislature has the right to prescribe the hours on Sunday when a man may be shaved or take a bath at his barbers *or be shaved at his house.* As well might our law framers set the hour when one may take his meals,

go to bed, take a drive, or ride in a horse car, or rise in the morning. But more is not needed to show the absurdity of the law as viewed by every day standards of common sense in the minds of everyday people.

We are aware, however, that this is not enough in itself upon which to pass sentence on the law, and that it must be judged by the rules which the decisions have laid down.

It is well that the courts of our State have had many occasions to condemn ill advised legislative acts that have been obnoxious to the constitutional safeguards.

That the legislature cannot under the guise of its police power enact laws to suppress harmless acts which have no relation to the *health, safety, or well being of society* has been too often held to now admit of question.

One of the most instructive as well as late cases on the subject is

People *vs.* Gilson, 109 N. Y., 389, and cases cited.

It involved the construction of a provision of the penal code prohibiting the sale of any article of food upon any inducement that anything else would be given as a gift, prize or premium therewith.

The Court in pronouncing the act inimical to the guaranteed rights of a citizen, uses the following language:

"The following propositions are firmly estab-
"lished and recognized: a person living under our
"constitution has the right to adopt and follow
"such lawful industrial pursuit not injurious to
"the community as he may see fit. The term
"'liberty' as used in the constitution is not
"dwarfed into mere freedom from physical re-

" straint of the person of the citizen by incarcera
" tion, but is deemed to embrace the right of man
" to be free in the enjoyment of the faculties with
" which he had been endowed by his creator, *sub-*
" *ject only to such restraint as is necessary for*
" *the common welfare.* Liberty in its broad sense
" as understood in this country means the right
" not only of freedom from servitude, imprison-
" ment or restraint, but the right of one to use his
" faculties in all lawful ways to live and work
" when he will, to earn his livelihood in any law-
" ful calling and to pursue any lawful trade or avo-
" cation. These principles are contained and
" stated in the above language in various cases,
" among which are :

" Livestock Association *vs.* Crescent
" City Co., 1 Abb. (U. S.), 388, 389.
" Slaughter House cases, 16 Wall., 36.
" Matter of Jacobs, 98 N. Y., 98.
" Berthoef *vs.* O'Reilly, 74 N. Y., 509.
" People *vs.* Marx, 99 N. Y., 377."

The learned Court then proceeds to criticise the misguided folly which actuates some people who fly to the legislature to secure the enactment of foolish laws in the hope of protection against fancied ills they suffer from the competition of others in trade, and continues :

"It cannot be truthfully maintained that this
" legislation does not seriously infringe upon the
" liberty of the owner or dealer in food products
" to pursue a lawful calling in a proper manner or
" that it does not to some extent at least deprive
" a person of his property by curtailing his power
" of sale and unless this infringement and depri-
" vation are reasonably necessary for the common
" welfare, or may be said to fairly tend in that
" direction or to that result the legislation is in-

" valid as plainly violative of the constitutional
" provision under discussion.

" This brings us to the consideration of the ques-
" tion whether the act is valid as proper exercise
" of what is by way of classification called the po-
" lice power of the State. That power has never
" yet been fully described, nor its extent plainly
" limited further at least than this, it is not above
" the constitution, but it is bounded by its provis-
" ions, and if any liberty or franchise is expressly
" protected by any constitutional provision it can-
" not be destroyed by any valid exercise by the
" Legislature or the executive of the police
" power. * *"

The Court recites with approval the case of
*In re* Jacobs (98 N. Y., 107),

in which the act prohibiting the manufacture of cigars in tenement houses was annulled as unconstitutional and to which we hereafter refer, and also the case of

People *vs.* Marx (99 N. Y., 377),

where the Act prohibiting the manufacture and sale of oleomargarine was adjudged unconstitutional as proscribing an important branch of industry not *injurious to the community and not fraudulently conducted.*

" Under an exercise of the police power the
" enactment must," the Court continues, " have
" reference to the comfort, the safety or the wel-
" fare of society and must not be in conflict with
" the constitution. The law will not allow the
" rights of property to be invaded under the guise
" of a police regulation for the protection of
" health, when it is manifest such is not the object
" and purpose of the regulation (see Austin *vs.*
" Murray, 16 Pick., 121, 126; Com. *vs.* Alger, 7

"Cush., 53, 84. Cited with approval in matter of "Jacobs, *supra*).

"As is also said in the last case, it is generally "for the Legislature to determine what laws and "regulations are needed to protect the public "health and serve the public comfort and safety, "and if its measures are calculated, intended, con- "venient or appropriate to accomplish such ends "the exercise of its discretion is not the subject of "judicial review. But those measurers must have "some relation to these ends. Courts must be "able to see upon a perusal of the enactment that "there is some fair, just and reasonable connec- "tion between it and the ends above mentioned. "Unless such relation exists the enactment can- "not be upheld as an exercise of the police "power."

We think that the case at bar calls for an application of precisely the same principles.

If there ever was a form of labor excusable on the Sabbath it is the exercise of a barber's trade. It is certainly so much a matter of necessity as to warrant its classification with other acts indulged in on that day which have never since the days of our Puritan ancestors been thought the reverse. It is as necessary as the labor performed in preparing food for Sunday meals and any other usual routine of duty on that day. In the days of the Blue Laws all food was cooked beforehand and eaten cold on Sunday. Shall we say that because we have relaxed from this rigorous custom in these latter days that we are not entertaining rational views on questions of Sunday observance? Might not our lawgivers with equal justice prohibit all forms of travelling on Sunday, including Sunday excursions, driving, bicycling or even Sunday walks? These are all forms of exercise if peaceably conducted, with

which no American community with our ideas of government will ever concede that the Legislature has a right to interfere. In deciding upon the propriety of many of such acts on the Sabbath, the better view is that each individual must be governed by his own conscience.

Matter of Jacobs (98 N. Y., 98), was decided in 1885, three years earlier than the Gilson case from which we have so largely quoted, and it deals with the subject of constitutional limitations with great ability and learning, and applies with as much force to the case at bar as the opinion in the case of Gilson.

The act under consideration in that case was Chapter 272 of the Laws of 1884, entitled "An Act "to improve the public health by prohibiting the "manufacture of cigars and preparation of tobacco "in any form in tenement houses, &c."

Section 1 reads: "The manufacture of cigars or "preparation of tobacco in any form in any floor "or any part of any floor in any tenement house is "hereby prohibited if any part of such floor is by "any person occupied as a home or residence for "the purpose of living, sleeping, cooking or doing "any household work therein."

Section 2. Defined what should constitute a tenement house.

Section 3. Exempted the first store floor from the operation of the act, and

Section 5. Made a violation of the act a misdemeanor, and prescribed the punishment therefor.

The Court criticises the operation of the law in vigorous language, and demonstrates the resulting injustice of it toward poor cigar makers whose very existence may depend upon their freedom to ply their trade at their homes, and adds, "it is "therefore plain that this law interferes with the

" profitable and free use of his property by the " owner or lessee of a tenement house who is a " cigar maker, and trammels him in the application " of his industry and the disposition of his labor, " and thus in a strictly legitimate sense it arbi- " trarily deprives him of his property and of some " portion of his personal liberty.

" The constitutional guaranty that no person " shall be deprived of his property without due " process of law may be violated without the physi- " cal taking of property for public or private use. " Property may be destroyed or its value may be " annihilated; it is owned and kept for some useful " purpose and it has no value unless it can be used. " Its capability for enjoyment and adaptability " to some use are essential characteristics and " attributes without which property cannot be con- " ceived; and hence any law which destroys it or " its value, or takes away any of its essential at- " tributes, deprives the owner of his property."

The application of this doctrine to the case at bar is readily apparent. The "essential attributes," as the Court terms them, of the plaintiff in error's property is the income he derives from shaving his customers' faces and shearing their hair. The property value of his shop equipment is of no use to him if not employed in his trade.

Sunday is the barber's busiest day, because out of respect to the day and a commendable desire to be clean, a greater number then seek his shop. Does his making of this day like other days seem less respectful than the case of the butler, maid or cook whose domestic duties are perchance made greater on Sunday by reason of numerous guests at the master's table?

" All laws, therefore," the Court goes on to say, " which impair or trammel these [constitutional] " rights which limit one in the choice of a trade or

" profession or confine him to work or live in a " specified locality or exclude him from his own " house or restrain him in his otherwise lawful " movements (except as such laws may be passed " in the exercise by the Legislature of the police " power which will be noticed later), are infringe- " ments upon his fundamental rights of liberty, " which are under constitutional protection "

Quoting in this connection from Butchers' Union Co. *vs.* Crescent City Co. (111 U. S., 746).

And Livestock &c., Assn. *vs.* Crescent City Co., 1 Abb. (U. S., 389).

In speaking of what is police power, the Court goes on to say :

" The limit of the power cannot be accurately " defined and the Courts have not been able or " willing definitely to circumscribe it. But the " power, however broad and extensive is not above " the constitution. When it speaks, its voice " must be heeded. It furnishes the supreme law, " the guide for the conduct of legislators, judges " and private persons, and so far as it imposes re- " straints, the police power must be exercised in " subordination thereto. Judge Cooley, speaking of " the regulation by the Legislature under the " police power of the conduct of corporations " holding inviolable charters, says : The limit to " the exercise of the police power in these cases, " must be this ; the regulations must have refer- " ence to the comfort, safety and welfare of " society ; they must not be in conflict with any " of the provisions of the charter, and they must " not, under pretense of regulation take from the " corporation any of the essential rights and privi- " leges, which the charter confers. * * *

" In Potter's Dwarris on Statutes, 458, it is said " that : the limit to the exercise of police power " can only be this ; the legislation must have ref-

" erence to the comfort, the safety or welfare of
" society, it must not be in conflict with the pro-
" visions of the constitution. * * *

" In Austin *vs.* Murray (16 Pick., 121-126),

" it is said: the law will not allow the rights of
" property to be invaded under the guise of a po-
" lice regulation for the promotion of health, when
" it is manifest that such is not the object and
" purpose of the regulation. * * *

" In the Slaughterhouse case (16
" Wall., 36),

" FIELD, J., says: All sorts of restrictions and
" burdens are imposed under the police power, and
" when these are not in conflict with any constitu-
" tional prohibitions or fundamental principles,
" they cannot be successfully assailed in a judicial
" tribunal. * * * But under the pretense of
" prescribing a police regulation the State cannot
" be permitted to encroach upon any of the just
" rights of the citizen which the constitution in-
" tended to secure against abridgment.

" In Coe *vs.* Schultz (47 Barb., 64), a learned
" judge, speaking of the constitutional limitations
" upon the police power says: I am not willing to
" concede that the Legislature can constitutionally
" declare an act or thing to be a common nuisance,
" which palpably, according to our present experi-
" ence or information, is not and cannot under
" any circumstances be a common nuisance, by
" the common law definitions or common law de-
" cisions. I am not willing to conclude that the
" legislature can constitutionally declare or author-
" ize any sanitary commission or board to declare
" the keeping or the use, in any way of sugar or
" vinegar to be a common nuisance, because the

" one is sweet and the other sour or for any other " reason.

" These citations are sufficient to show that the " police power is not without limitations, and that " in its exercise the legislature must respect the " great fundamental rights guaranteed by the con- " stitution. If this were otherwise the power of " the legislature would be practically without " limitation. In the assumed exercise of the police " power in the interest of the health the welfare or " the safety of the public, every right of the citizen " might be invaded and every constitutional bar- " rier swept away.

" Generally it is for the legislature to determine " what laws and regulations are needed to protect " the public health and secure the public comfort " and safety, and while its measures are calculated, " intended, convenient and appropriate to accom- " plish these ends, the exercise of its discretion is " not subject to review by the Courts. But they " must have some relation to these ends. Under " the mere guise of police regulations personal " rights and private property cannot be arbitrarily " invaded, and the determination of the legisla- " ture is not final or conclusive. * * * *

" It matters not that the legislature may in the " title to the act or in its body declare that it is " intended for the improvement of public health. " Such a declaration does not conclude the Courts, " and they must yet determine the fact declared " and enforce the supreme law."

On page 112 of the same opinion, the Court continues:

" A law enacted in the exercise of the police " power must in fact be a police law. It must be " a law for the promotion of the public health."

So we beg leave to add in criticising the act

passed by the late legislature of which the plaintiff in error complains, that in no conceivable way can the prohibition of barbering on Sunday tend to promote public comfort or public welfare. We think we have shown that the exercise of a barber's trade *directly promotes in the most harmless manner the comfort, convenience and necessities of the citizen.*

In the language of the above decision it is for this Court to say whether the act can stand as a lawful exercise of the police power of the State of New York within the limitations assigned by its Court of last resort, and by the decisions of the Supreme Court of the United States before which we now stand.

In concluding a review of the opinion in the Jacobs case we cite a portion of the language on page 115 as follows:

"When a health law is challenged in the Courts "as unconstitutional on the ground that it ar- "bitrarily interferes with personal liberty and "private property without due process of law, "the Courts must be able to see that it has at "least in fact some relation to the public health, "that the public health is the end actually aimed "at, and that it is appropriate and adapted to "that end. This we have not been able to see in "this law, and we must therefore pronounce it un- "constitutional and void."

Even as late as 1895 has been decided the case of

Health Dept. *vs.* Rector, &c., 145 N. Y., p. 32,

and that of

People *ex rel.*, &c. *vs.* Warden, &c., 144 N. Y., 529.

This Court will in both of these cases find laid down identically the same doctrine as that ex-

pressed in cases already quoted, with regard to the constitutional limits of the police power.

We do not deny the power of the Legislature to enact appropriate measures for the decorous observance of the Sabbath and to protect it from desecration, so that we have no quarrel with the great case of Lindmuller *vs.* The People, 33 Barber, 548, which is usually cited as the leading authority in support of the Legislative power to enact Sunday laws in N. Y. State.

The Lindmuller case is undoubtedly law to-day in New York State. The opinion written in it was a masterly defense of the sacredness of the Sabbath and a recognition of it as the law of the land on the broad plane of Christianity, but the facts of that case were essentially different from ours.

No one could argue for a moment that giving a theatrical exhibition, ministering to the æsthetic senses alone, bears comparison on the score of necessity with tonsorial operations, which are as perfectly inseparable from cleanliness and bodily comfort as a person's morning ablutions.

It will not do to say that the barber can duly serve his patrons on Saturday or any other day of the week and that people who cannot manage to be shaved then or on Sunday morning ought to go without it. Many people have beards which absolutely require removal every single day, including Sunday, as the proof shows in the case at bar.

What will a man so furnished do if he cannot go to his barber nor his barber to him on Sunday, provided he has never learned to shave himself, and there are many who cannot do so.

We insist that when the learned Court in the Lindmuller case said that the Legislature was the sole judge of the propriety of its laws in the passage of Sunday measures it could not have had in contemplation the spectacle of a Legislature under-

taking to pass a law suppressing an act as innocent from every standpoint of morality as any in the routine of daily household economy, Sunday included.

We submit that the doctrine in the Lindmuller case must be limited to facts presented which show at least some excuse for the exercise of the legislative discretion, *some rational* ground at least for legislative interference even though such interference were made subject of grave criticism as to its wisdom and propriety.

We are confident that the principles laid down in the Jacobs and Gilson cases which we have quoted extensively in our brief must be taken as modifying the force of the Lindmuller case and discriminating between the cases where the legislature has acted with some *plausability* and cases where it has put in force a law which cannot be defended with *any show of reason whatever.*

We think to press again upon the Court's attention that the Collins' Law not only closes barber shops but interdicts a barber from waiting on a customer even at his house.

The highest Court of Illinois has recently pronounced a law of that State which closed barber shops on Sunday.

See Eden *vs.* The People, 161 Ill., p. 296.

The opinion rendered reads in part as follows:

"This statute, as has been seen, declares: That "it shall be unlawful for any person or persons to "keep open any barber shop or carry on the bus- "iness of shaving, haircutting or tonsorial work "on Sunday. That act is plain and its meaning is "obvious; the owner of a place who carries on the "the business of a barber is prohibited from doing "any business whatever during one day in the

" week ; he may have in his employ a dozen men " and yet during one day in seven he is deprived " of their labor and also deprived of his own labor. " The income derived from his place, and his own " labor, and the labor of his employes is his prop- " erty, but the legislature has by the Act taken " that property from him. The journeyman bar- " ber who works by the day or week, or for the " share or amount he may receive from customers " for his services, is by the law denied the right of " laboring one day in the week ; he may rely solely " upon his labor for the support of himself and " family, his labor may be the only property that " he possesses, and yet this law takes that prop- " erty away from him, his labor is his capital and " that capital is all the property he owns. Can a " law which takes that from a laborer be sus- " tained? The Constitution of the United States " says that the State shall not deprive any person " of property without due process of law, and our " State Constitution declares the same thing. " What is understood by the term due process of " law is not an open question. 'Due process of " law' is synonymous with 'law of the land,' and " the 'law of the land' is 'general public law, " binding upon all the members of the community, " under all circumstances and not partial or pri- " vate laws, affecting the rights of private individ- " uals or classes of individuals.' Millett *vs.* The " People, 117 Ill., 294. * * *

" In Tiedeman's Limitation of Police Powers, " the author, Section 85, says: The State in its " exercise of police power is, as a general proposi- " tion, authorized to subject all occupations to a " reasonable regulation where such regulation is " required for the protection of the public " interest or for the public welfare. It is " also conceded that there is a limit to the exer-

" cise of this power, and that it is not an unlimited
" arbitrary power which would enable the Legis-
" lature to prohibit a business the prosecution of
" which inflicts no damages upon others. The
" author also lays down the rule that it is in the
" discretion of the Legislature to institute such
" regulations when a proper case arises. But it is
" a judicial question whether the mode or calling
" is of such a nature as to justify police regulation.
" In Millett *vs.* The People, *supra*, in speaking of
" the police power of the State as applicable to the
" case there before the Court, it is said: Their re-
" quirements have no tendency to insure the per-
" sonal safety of the miner or to protect his property
" or the property of others. They do not meet
" Dwarris's definition of police regulation. They
" do not have reference to the comfort, the safety
" or the welfare of society (Dwarris, 458). In
" Austin *vs.* Murray, 16th Pick., 121, it was said:
" The law will not allow the rights of property to
" be invaded under the guise of a police regulation
" for the promotion of health when it is manifest
" that such is not the object and purpose of the
" regulation. See also Watertown *vs.* Mayo, 109
" Mass., 315, and cases referred to in the matter of
" application of Jacobs, 98 N. Y., 109. * * *

" It will not and cannot be claimed that the law
" in question was passed as a sanitary measure or
" that it has any relation whatever to the health of
" society. As has been heretofore foreseen as a
" general rule, a police regulation has reference to
" the health, comfort, safety and welfare of
" society. How it may be asked is the health,
" comfort, safety or welfare of society to
" be injuriously affected by the keeping open
" of a barber shop on Sunday. It is a matter of
" common observation that the barber business as
" carried on this State is both quiet and orderly.

" Indeed it is shown by the evidence incorporated " in the record that the barber business as con- " ducted is quiet and orderly, much more so than " many other departments of business. In view " of the nature of the business and the manner in " which it is carried on, it is difficult to perceive " how the rights of any person can be affected or " how the comfort and welfare of society can be " disturbed. If the Act was one calculated to pro- " mote the health, comfort, safety and welfare of " society then it might be regarded as an exercise " of police power of the State. In Railway *vs.* " Jacksonville, 67 Ill., 37, it was held, if the law " prohibits that which is harmless in itself or re- " quires that to be done which does not promote " the health, comfort, safety or welfare of society, " it would in such case be an unauthorized exer- " cise of power, and it would be the duty of " Courts to declare such legislation void.

" In Ritchie *vs.* The People, in speaking of the " police power of the State, the Court said : 'The " ' police power of the State is that power which " ' enables it to promote the health, comfort, safety " ' and welfare of society. It is very broad and far " ' reaching, but is not without its limitations. " ' Legislative Acts passed in pursuance of it must " ' not be in conflict with the Constitution and " ' must have some relation to the ends sought to " ' be accomplished, that is to say, to the comfort, " ' welfare or safety of society. Where the " ' ostensible object of an enactment is to secure " ' the public comfort, welfare or safety, it must " ' appear to be adapted to that end ; it cannot " ' invade the rights of persons and property " ' under the guise of a mere police regulation, " ' when it is not such in fact ; and where such an " ' Act takes away the property of a citizen or in- " ' terferes with his personal liberty, it is the

" ' province of the courts to dermine whether it is
" ' really an appropriate measure for the promo-
" ' tion of the comfort, safety and welfare of so-
" ' ciety.' We do not therefore think the law was
" authorized by the police power of the State.
" The judgment will be reversed."

## POINT II.

### The Act is an instance of Class legislation and should be condemned on this ground as against the guaranteed rights of the citizen under the U. S. Constitution.

It may with truth be admitted that the Legislature has power to pass laws which bear with different force upon different localities.

Where there is a shadow of reason for the discrimination, the law-making power must needs be thus broad. So that we do not declaim against the Collins Law on this account, but we do declaim against it as class legislation because *without reasonable excuse* or justification, it grants a privilege to New York and Saratoga barbers, which it denies to all other barbers in the State.

We urge this reason advisedly, being well aware that *our* plaintiff in error is among those allowed by gracious legislative permission to keep open Sunday forenoon. This partial exemption is not, however, received kindly by him because Sunday afternoon would be a far better time for his trade than Sunday morning, since his class of customers have been early afternoon patrons as the testimony shows.

But we think we can criticise this law on general grounds, and from the standpoint of the barber living *outside* of New York or Saratoga who is not in a measure favored by the exemption. For if it is invalid as affecting one section of territory it is invalid everywhere and as against all.

What would be thought of an act which interdicted barbers below Fourteenth street in the city of New York from practicing their trade while above that street the trade was permitted, yet this would be a parallel case.

What reason in law or morals is there for discriminating between barbers in New York and Saratoga and those elsewhere. If the measure is to be upheld as a police regulation designed to promote order and the proper observance of Sunday then as so often repeated in the opinions we have quoted, the law must by its terms have *some rational tendency*, some appropriateness toward the end aimed at, but as we think we have abundantly shown, the operation of the law is *absolutely destitute* of such end, because in no sense does barbering in itself offend against the holy day any more than eating, dressing, walking or any other necessary act.

We cannot rest our case without directing considerate attention of this learned Court to the two dissenting opinions of Judges Gray and Bartlett in the N. Y. Court of Appeals.

Judge Gray, while not denying the power of the legislature within reasonable limits to enact laws against the desecration of the Sabbath, maintains that it has no right to interfere with a calling that is necessary to the comfort and decency of the citizen (see fol. 112 of Record). And we may add that it is decidedly against the genius and spirit of American institutions to put in force in this age and generation a sumptuary law, which is, we

think, an impertinent interference with every man's right to arrange his toilet on Sunday.

But, added to this arraignment of the law, Judge Gray disapproves of it because he thinks it is purely class legislation. At folios 113 and 114 of the record, he says that if the act could be defended as a fair exercise of the State's police power, yet it is without shadow of excuse in clos ing up barber shops on Sunday in all other parts of the State, while permitting them to remain open for a part of that day in New York and Saratoga Springs.

This brings up the point whether such a discrimination is not directly obnoxious to the Fourteenth Amendment of the U. S. Constitution as explained in the case of

Hayes *vs.* State of Missouri, 120 U. S., p. 68,

where it is said.

"The 14th Amendment requires that all per-
"sons subjected to such legislation, *i.e.*, legislation
"which is limited either in the objects to which
"it is directed or by the territory within which
"it is to operate—shall be treated alike under like
"circumstances and conditions both in the privi-
"leges conferred and in the liabilities imposed.
"As is said in Barbier *vs.* Connelly, 113 U. S.,
"27-32 — speaking of the 14th Amendment;
"Class legislation discriminating against some and
"favoring others is prohibited, but legislation
"which in carrying out a public purpose is limited
"in its application if within the sphere of its
"operation it affects all persons similarly situated
"is not within the amendment."

See also Weston *vs.* Nevin, 128 U. S., p. 578.

How can it be said that this law bears with equal force upon all barbers within the State "similarly situated"? For aught we see, barbers in all the larger cities of the State would be "similarly situated" in this respect, that municipal conditions affecting their hours of labor as suited to the requirements of their customers are generally different from the conditions that affect the business operations of country and village barbers.

In the villages and smaller settlements of the State, we are all aware that the average citizen is not by press of business prevented from calling on the barber to be shaved on Saturday evening, while in larger places Saturday evenings are generally busier periods, involving detentions which interfere with a man's visiting his barber untill Sunday. Therefore with such a condition of affairs in view, a law might be defended as not a specimen of class legislation, which closed barber shops on Sunday in all small centres of population where the male inhabitants might be presumed as not being inconvenienced thereby, and allowing them to remain open for at least a time on Sunday to dwellers in larger municipalities.

This distinction in such a law would have found a justifying cause as against attack on the score of its being class legislation for, as against all barbers similarly situated and under like conditions, the law would bear with equal force, *i. e.*, *all* city barbers could hold open for a time on Sunday, while *all* country barbers could not, and the reason for discrimination would be understood; but where is such a justifying distinction found when we reflect that New York City is a great city, and Saratoga Springs is an infinitely smaller city, a village, indeed, at least in name?

In no such sense as we have suggested can barbers in these two places be said to be sim-

ilarly situated. Though if the discriminating feature were given operation in all cities of any size, specifying which they were, and taking in for example New York City, Albany, Troy, Brooklyn, Buffalo and others, then this precise objection would be overcome.

Appropriate to this discussion is the decision of the Supreme Court of Ohio in the case of City of Cincinnati *vs.* Steinkamp, 43 N. E. R., p. 490.

We subjoin the syllabus and the major part of the opinion:

"Sections 32 and 61 of the act of February 28. "1888, entitled 'An Act to regulate the construc- "tion of buildings within any city of the first class "and first grade,' &c. (85 Ohio Laws, 34), which "require, among other things, that all buildings "(save private residences) of three or more stories "in height shall be provided with suitable fire "escapes, and require the owner or occupant, upon "30 days' notice by the fire inspector, to put up "such escapes, and provide punishment by fine "for non-compliance with such order, and em- "power a Court of equity, on application of the "inspector, by suit in the name of the city, to "enforce the provisions of the act and enjoin the "use or occupation of any building used in viola- "tion of the act, are not invalid as depriving the "owner of the use of property without the inter- "vention of a jury, nor as depriving him of due "process of law. But said sections are in conflict "with section 26, art. 2, of the Constitution, which "prescribes that "all laws of a general nature "shall have a uniform operation throughout the "State," and are therefore invalid, inasmuch as "the act is one of a general nature, and has oper- "ation only in the City of Cincinnati.

"On the latter point the Court said, in part:

" In State *vs.* Bargus (53 Ohio St.,—41 N.E., 245),
" it is held that 'laws providing for the pub-
" lic support of the poor are of a general nature,'
" and that 'an act by which the general assembly
" attempts to exempt counties from the operation
" of general laws on account of trivial differences in
" population are not of uniform operation through-
" out the State' (see also *Ex parte* Falk, 42 Ohio
" St., 638, and State *vs.* Ellet, 47 Ohio St., 90; 23
" N. E., 931). It is observed by BOYNTON, J., in
" McGill *vs.* State (*supra*): 'The difficulty en-
" countered in all cases where a legislative act is
" alleged to contravene the provision requiring the
" uniform operation of law of a general nature lies
" in determining what constitutes a law of that
" nature, within the meaning of the Constitution.
" The test is said to depend upon the character of
" its subject matter; that if that is of a general, as
" distinguished from a local or special nature, ex-
" isting in every county throughout the State—a
" subject in which all the citizens have a common
" interest—then the law is one of a general nature,
" requiring a uniform operation throughout the
" State.' 'Existing in every county throughout
" the State' means, we suppose, only in every
" county where the conditions of the statute exist;
" for, in order to be general and uniform in opera-
" tion, it is not necessary that the law should op-
" erate upon every person in the State, nor in every
" locality. It is sufficient, the authorities coincide
" in holding, if it operates upon every person
" brought within the relation and circumstances
" provided for, and in every locality where the
" conditions exist. But, on the other hand, it
" seems equally well settled, a law is not of uni-
" form operation if it exempts a portion of those
" coming within its terms, that is, if it confers a
" privileges or imposes burdens upon some of a

"class answering the description which are not "conferred or imposed upon all others belonging "to the same category. And it would seem to "follow from this that the constitutional require- "ment of uniform operation throughout the State "is not answered by showing that the law is of uni- "form operation with in one city of the State only "however populous, and even though described "as a city of the first grade of the first class, if "it appears that the conditions undertaken to be "legislated upon are common to many other sec- "tions of the State. The subject of the statute "under consideration is the protection of persons "from the dangers of fire. This is implied in its "title, as well as subject matter, and is perhaps "made clearer by the title of the amendment of "April 18, 1892, which is entitled 'An Act to "to provide for the better protection of human "life against fire,' &c. Protection of life and limb, "it would seem, is not a local matter, but is a "matter of general public interest, in which every "person in the State coming within the category "of people exposed to the dangers intended to be "guarded against is equally interested with every "other such person, and it would appear to be as "much the duty of owners of buildings answering "to the description as to construction and occu- "pancy of those named in the statute to observe "the humane directions of this act whether lo- "cated in one part of the State or in another. "Doubtless there may be greater dangers in a "thickly populated city from the causes named "than in the rural districts, but how can it be said "that there is any appreciable difference between "the hazards incident to occupancy of such build- "ings in the City of Cincinnati and those to be "encountered in Cleveland, Columbus, Toledo, or "any other of the larger cities of the State? If

"any reasons of a local character exist which "require this legislation for Cincinnati which do "not apply with equal force to other cities, none "appear on the surface, and certainly none have "been suggested. Being a law of a general nature, "not adapted alone to Cincinnati, and lacking the "requirement of uniform operation, we are of "opinion that the sections cited are in clear con- "flict with section 26 of article 2 of the Constitu- "tion; and realizing, as every observer must, the "growing tendency to render this limitation on "legislative power directory merely, and to treat "it as if it were devoid even of moral obligation, "by resorting to local legislation upon matters, "which, if of importance, concern the people of "all parts of the State, we are impelled by duty, "whenever such acts are brought before us for "review, and their invalidity appears clear, to so "declare. Upon this ground the judgment of the "Circuit Court dismissing the case should be "affirmed."

The Court of Tennessee has held a similar law invalid.

State *vs.* Torry, 7 Bax., 95.

## POINT III.

**Upon the foregoing grounds it is respectfully urged that the judgment of conviction should be reversed.**

ALBERT I. SIRE,
Attorney for Plaintiff in Error.

No. 227.

Add'l Brf. of Sire for P. C.

No. 227

Filed Jan. 24, 1898.

## ADDENDA.

Since the foregoing brief was prepared, we have discovered a late decision of the Supreme Court of California, declaring invalid upon constitutional grounds a section of the Penal Code of that State, which was an enactment very much like the one in the State of New York, which we here bring under review, differing in this respect however that the California statute prohibited all barbers from running their business on Sundays and on legal holidays after 12 o'clock noon.

The very forcible opinion of Judge HENSHAW, we quote from in part:

The objections urged to the law were that it contravened three sections of the Constitution of the State of California viz.:

"ALL men are by nature free and independent, "and have certain inalienable rights, among which "are those of enjoying and defending life and lib- "erty, acquiring, possessing and protecting prop- "erty and pursuing and obtaining safety and hap- "piness (Const., Art. I, Sec. 1.)

"No special privileges or immunities shall ever "be granted which may not be altered, revoked or "repealed by the Legislature; nor shall any citizen "or class of citizens be granted privileges or im- "munities which, upon the same terms, shall not "be granted to all citizens (Const., Art. I, Sec. 21.)

"The Legislature shall not pass local or special "laws in any of the following enumerated cases, "that is to say:

"2. For the punishment of crimes and misde-
"meanors * * * in all cases where a general
"law can be made applicable (Const., Art. IV,
"Sec. 25, subds. 2, 33)."

After quoting this the Court delivered itself of the following opinion in part.

In the course of the opinion all of which is a valuable elucidation of the subject presented, and which we beg that the Court will read as a whole, the learned Justice says :

"So, while the police power is one whose proper
"use works most potently for good, in its unde-
"fined scope and inordinate exercise lurks no
"small danger to the republic. For the difficulty
"which is experienced in defining its just limits
"and bounds, affords a temptation to the legis-
"lature to encroach upon the rights of citizens
"with experimental laws, none the less dangerous
"because well meant.

"We think the Act under consideration gives
"plain evidence of such encroachment. It is
"sought to be upheld by the argument that it is a
"police regulation; that it seeks to protect labor
"against the oppression of capital; that the people
"have passed the law, let not the Courts interfere
"with it and if the people are dissatisfied they
"may amend or repeal it.

* * * * * *

"The laboring barber, engaged in a most re-
"spectable, useful and cleanly pursuit, is singled
"out from the thousands of his fellows in other
"employments and told that, willy-nilly, he shall
"not work upon holidays and Sundays after
"twelve o'clock noon. His wishes, tastes or
"necessities are not consulted.

* * * * * *

"A law is not always general because it operates "upon all within a class. There must be back of "that a substantial reason why it is made to oper- "ate only upon a class and not generally upon all. "As was said in Pasadena *vs.* Stimson, 91 Cal., "238: 'The conclusion is that although a "law is general and constitutional when it "applies equally to all persons embraced "in a class founded upon some natural or "intrinsic or constitutional distinction, it is not "general or constitutional if it confers particular "privileges or imposes peculiar disabilities or bur- "densome conditions in the exercise of a common "right upon a class of persons arbitrarily selected "from the general body of those who stand in pre- "cisely the same relation to the subject of the "law.' And in Darcy *vs.* Mayor, etc., of San Jose, "104 Cal., 642: 'The classification, however, must "be founded upon differences which are either de- "fined by the Constitution or natural, and which "will suggest a reason which might rationally be "held to justify the diversity of legislation.'"

There are two other States in which we find this same question has been recently passed upon favorable to our contention.

These are the cases of

City of Tacoma *vs.* Kreck (State of Washington, September 28th, 1896).
See 46 Pacific Rep. 255.
See also State *vs.* Granneman (Missouri, January 21st, 1896).
See 33 Southwestern Reporter 784.

ALBERT I. SIRE,
Attorney for Plaintiff in Error.

No. 227.

Brief of Gardiner for D. E.

Filed April 21, 1898.

In the Supreme Court of the United States.

October Term, 1897.

No. 227.

HENRY J. HAVNOR,
*Plaintiff in Error,*
*v.*
THE PEOPLE OF THE STATE OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

# BRIEF FOR THE DEFENDANT IN ERROR.

ASA BIRD GARDINER,
DISTRICT ATTORNEY.

# In the Supreme Court of the United States.

OCTOBER TERM, 1897.

**No. 227.**

| | |
|---|---|
| HENRY J. HAVNOR, Plaintiff in Error, vs. THE PEOPLE OF THE STATE OF NEW YORK. | In error to the Supreme Court of the State of New York. |

## Brief for the Defendant in Error.

The plaintiff in error was convicted in the Court of Special Sessions of the City and County of New York, on the 4th day of November, 1895, of violating the provisions of the New York statute known as Chapter 823 of the Laws of 1895, entitled "An Act to Regulate Barbering on Sunday," which makes it a misdemeanor to carry on or engage in the business of shaving, hair-cutting or other work of a barber on the first day of the week, except in the city of New York and in the village of Saratoga Springs, in that state, where such work may be performed until one o'clock in the afternoon of such day (Record, pp. 2, 17).

It was proven by the evidence, and admitted on the trial, that on the 9th day of June, 1895, after one o'clock in the afternoon, at the barber shop kept by the defendant, at No. 57 West Thirty-third street, in the city of New York, the plaintiff in error's employes, in his presence, and by and with his consent and procurement, after the hour mentioned in the statute, carried on and engaged in the work of barbers in his shop (pp. 10-15), and the only question there presented was whether the statute upon which the prosecution was based is a constitutional enactment (pp. 15-16), counsel for the plaintiff in error assailing its validity solely on the ground "that it appears from the testimony that barbering on Sunday is a work of necessity," and that therefore, "the act which prohibits barbering on Sunday under the decisions of the Court of Appeals of this state would be unconstitutional" (p. 15).

From the judgment rendered on the conviction the plaintiff in error appealed to the Supreme Court of the state of New York (p. 5). The judgment was affirmed by the Appellate Division of the Supreme Court on the 7th day of February, 1896 (pp. 19-20), and the plaintiff in error then appealed to the Court of Appeals.

There it was argued:

(1.) That the act is void under Article 1 of the constitution of the state of New York, which provides that "No person shall be deprived of life, liberty or property without due process of law."

(2.) That it is void, not only under this clause of the state constitution, but under the rights guaranteed by the Vth and XIVth amendments to the constitution of the United States to the citizens of the several states, and

(3.) That it is void as an unwarrantable exercise of the police power of the state, operating to the in-

jury of the defendant in his business, without any tendency to promote the good order, health and comfort of the community, but, on the contrary, contributing directly to its discomfort and inconvenience (pp. 28-36).

On the 14th day of April, 1896, the Court of Appeals affirmed the judgment of the Appellate Division, and remitted the proceedings to the Supreme Court (pp. 42-43).

Error in the proceedings below is assigned by a general allegation to the effect that the New York Court of Appeals and Supreme Court erred in overruling the plaintiff in error's contention—

> " that the said conviction was illegal because the same was violative of the Fourteenth Amendment of the constitution of the United States, providing that ' no person shall be deprived of life, liberty or property without due process of law,' and of the corresponding clause in the constitution of the state of New York " (pp. 51-52).

**First**.—The statute is a valid exercise of the police power of the state.

(*a*.) The police power extends to the protection of persons and property within the state. In order to secure that protection either may be subjected to restraints and burdens by legislative acts. The individual must sacrifice his particular interest or desires, if the sacrifice is a necessary one, in order that organized society as a whole shall be benefited. Restraint of personal action is justified when it manifestly tends to the protection of the health and comfort of the community, and no constitutional guaranty is then violated.

If the legislation is calculated, intended, conve-

nient or appropriate to accomplish the good of protecting the public health or of serving the public comfort and safety, the exercise of the legislative discretion is not the subject of judicial review.

> "The general rule holds good that whatever is contrary to public policy or inimical to the public interests is subject to the police power of the state and within legislative control; and in the exercise of such power the legislature is vested with a large discretion, which if exercised *bona fide*, for the protection of the public, is beyond the reach of judicial inquiry."
>
> Louisville & Nashville Ry. *vs.* Kentucky, 161 U. S., 677 (at p. 700).

(*b.*) The statute under consideration is calculated, intended and appropriate to accomplish a public good.

Its object, as shown by its title and context, is to regulate a particular trade. It does not require the observance of the Sabbath as a religious institution. There is nothing in it to prevent barbers from carrying on their trade in any manner or in any place they see fit. They are simply required to abstain from prosecuting their trade on one day during each week, namely, on Sunday, excepting in certain specified places, where they are permitted to prosecute it even on that day during certain specified hours.

(*c.*) The peculiar character of the first day of the week as a day of rest and recreation has been recognized from time immemorial by legislatures and courts. Statutes requiring the cessation of all secular occupations on Sunday, passed in colonial times as well as under the various constitutions in force since the organization of the union, have uniformly been enforced in the state of New York.

29 Car. II., Chap. 7.
2 Green, 89.
Andrews, 467.

1 R. L., 194.
2 R. S., 675, Sect. 70.
Laws of 1788, Chap. 42.
Laws of 1801, Chap. 34.
Laws of 1847, Chap. 349.
Laws of 1883, Chap. 358.
Penal Code, §§ 259-270.

Similar laws in other states, requiring the closing of places of business on Sunday have generally been sustained.

People *vs.* Bellet, 99 Mich., 151.
Vogelsong *vs.* State, 9 Ind., 112.
Ungericht *vs.* State, 119 Ind., 379.
Shover *vs.* State, 10 Ark., 259.
State *vs.* Frederick, 45 Ark., 347.
Warner *vs.* Smith, 8 Conn., 14.
Bloom *vs.* Richards, 2 Ohio St., 387.
Specht *vs.* Commonwealth, 8 Pa. St., 312.
Commonwealth *vs.* Waldman, 140 Pa. St., 89.
Commonwealth *vs.* Jacobus, 1 Pa. Leg. Gaz., 491; 15 Central Law Journal, 145.
Commonwealth *vs.* Williams, 1 Pearson (Pa.), 61.
Commonwealth *vs.* Has, 122 Mass., 40.
Commonwealth *vs.* Dextra, 143 Mass., 28.
Bohl *vs.* State, 3 Tex. App., 683.
Phillips *vs.* Innes, 4 C. & F., 234; 2 Rob. Prac., 400.

See also—

Cooley's Const. Lim. (5th Ed.), 589, 726.
Tiedman's Lim. Police Power, 183.
Hare's Amer. Const. Law, 766.

(*d.*) While questions have arisen as to the right of the state to prohibit noiseless and inoffensive

occupations on Sunday, when such occupations can be carried on by one individual without the assistance of others, and as to the right to prohibit persons who habitually observe some other day for rest and recreation, from pursuing their usual occupations on Sunday, it may safely be asserted as a general proposition that all persons may be required by the sovereign power to suspend their ordinary business on Sunday, in order that thereby the physical and moral well-being of the public may be served. Inconvenience to some is not regarded as an argument against the constitutionality of statutes requiring such cessation of business, that being incident to all general laws. Accordingly, Sunday statutes having been sustained as constitutional, almost without exception, the most notable instance to the contrary,

*Ex parte* Newman, 9 Cal., 502,

which was decided by a divided Court, having been subsequently overruled.

*Ex parte* Andrews, 18 Cal., 685.
*Ex parte* Koser, 60 Cal., 202.

The leading New York case upon the subject is that of Lindenmuller *vs.* People, 33 Barb., 548, in which it was held that the state constitution recognizes Sunday as a day of rest; that it exists as such by the common law, and needs no legislation to establish it; and that the state may regulate its observance as a civil and political institution.

That case was expressly approved in Neuendorff *vs.* Duryea, 69 N. Y., 577, 561, 563, where it was referred to as a decision—

> "which has never been questioned in a court of higher or equal authority."

It was also cited with approval in People *vs.* Moses, 140 N. Y., 214, 215, where Judge Earl, delivering the prevailing opinion of the Court of Appeals said:

> "According to the common judgment of civilized men, public economy requires for sanitary reasons a day for general rest from labor, and the day naturally selected is that regarded as sacred by the greater number of citizens, as this causes the least inconvenience through interference with business."

(*e.*) It is to the interest of the state that its citizens should be robust, capable of self-support, of bearing arms, and of adding to the resources of the country. Laws to effect this purpose by protecting the citizen from overwork and assuring him an opportunity for necessary rest and recreation have a manifest tendency to benefit the public welfare. Wholly aside from any questions of morals or religion, the physical welfare of the citizen is so directly connected with, and of such primary importance to the state as to render laws, calculated to promote that object, well within the police power.

(*f.*) The statute under discussion manifestly tends to accomplish this result by requiring persons engaged in a class of trade that requires manual labor to refrain from such labor one day in seven. An opportunity is thus afforded for necessary rest both to the employer and employed, an opportunity which the latter, at least, might not be able to enjoy without the aid of legislation.

(*g.*) It cannot be said that the manifest beneficial public purposes and results before mentioned are not commensurate with the public discomfort and inconvenience consequent upon the enforcement of the statute.

The public health, comfort, or reasonable convenience does not require the keeping open of barber shops on Sunday, and there is no public "necessity" for their operation on that day in the proper sense of the word.

A work of necessity, in a legal sense, means a work upon the doing of which depends the public

health, comfort or decency, or which, by reason of peculiar circumstances, is imperative in a particular case.

1. The courts of several states have decided that the business of a barber in shaving his customers on Sunday is not a work of necessity.

Com. *vs.* Jacobus, 1 Pa. Leg. Gaz. Rep., 491; 15 Cent. L. Jour., 145.
Com. *vs.* Williams, 1 Pearson (Pa.), 61.
Com. *vs.* Waldman, 140 Pa. St., 89.
Com. *vs.* Dextra, 143 Mass., 28.
Ungericht *vs.* State, 119 Ind., 379.
State *vs.* Frederick, 45 Ark., 347; 55 Am. Rep., 555.

A different view was taken at one time in Tennessee,

State *vs.* Torry, 7 Baxt., 95,

but subsequently the legislature of that state passed an act, as to the constitutionality of which no question appears to have ever been raised, requiring the closing of all barber shops on Sunday.

2. That the work of a barber on Sunday is not a work of public "necessity" is a matter of common knowledge, and of which judicial notice will therefore be taken.

3. The evidence given by the plaintiff in error on the trial of the case at bar fairly presents the only possible grounds upon which such a contention could be made. He testified that he had customers who could not shave themselves, customers whose business kept them up late Saturday nights, and who required shaving on Sundays, and customers who rose as late as 1 or 2 o'clock on Sundays, and that it was necessary to shave all or some of these particular persons on Sunday afternoons, because their beards grew so fast every day that it was a matter of cleanliness to have them shaved (pp. 11–14).

This testimony simply showed that in these particular instances it was convenient for the individuals referred to that they should be shaved Sunday afternoons.

It may be suggested that, though these persons' comfort, or even their cleanliness, required, because of their inability to shave themselves or to repair to the defendant's shop before 1 o'clock, that they should go there and be shaved on Sunday afternoon, there was nothing in the evidence to show that the defendant had any reason to suppose that the general male public, or all his Sunday afternoon customers, including Officer McGovern, were men of similar temperament, or that he kept his shop open after 1 o'clock solely for the purpose of accommodating persons of that character.

**Second.**—The statute, instead of restricting the plaintiff in error's liberty of action in the conduct of his trade, in fact relieved him of an existing restriction.

Prior to the passage of the act of 1895 *all labor on Sunday was prohibited* in the state of New York, excepting works of necessity or charity, under a penalty of not less than five or more than ten dollars, or imprisonment for not exceeding five days, or both, for a first offense, and for a subsequent offense by a fine of not less than ten nor more than twenty dollars, and imprisonment for not less than five nor more than twenty days,

Penal Code, Sects. 263, 269.

In "works of necessity or charity" was included "whatever is needful during the day for the good order, health or comfort of the community."

*Ibid.*, § 263.

The business of "barbering" on Sunday not being, as we have above shown, needful for the public good order, health or comfort, was therefore wholly prohibited.

The Act of 1895 not only removed this absolute prohibition, so far as it affected barbers following their trade in the localities therein specified, of which the plaintiff in error was one, but expressly authorized them to keep their shops open and perform their work therein "until one o'clock of the afternoon of the first day of the week."

It moreover reduced the penalty for a first offense to a fine of not more than five dollars.

Chap. 823, Laws of 1895.

It is therefore difficult to understand how the plaintiff in error can properly claim to have suffered any injury by the passage of the statute.

**Third.**—The exercise of the police power of the State does not deprive anybody of life, liberty or property within the meaning of the Fourteenth Amendment.

Barbier *vs.* Connelly, 113 U. S., 27.
Powell *vs.* Pennsylvania, 127 U. S., 678, 683.
*In re* Rahrer, 140 U. S., 545.
Giozza *vs.* Tiernan, 148 U. S., 657.
N. Y. & N. E. R. R. Co. *vs.* Bristol, 151 U. S., 556.

**Fourth.**—The statute cannot be said to be class legislation within the prohibition of the Fourteenth Amendment.

(*a.*) A statute which is carrying out a legitimate public purpose is limited in its application to certain defined localities, but, within the territory to which

it applies, affects alike all persons similarly situated, is not within the prohibition.

The general objects and purposes of the Fourteenth Amendment—

> " are to extend United States citizenship to all natives and naturalized persons, and to prohibit the states from abridging their privileges or immunities, and from depriving any person of life, liberty or property without due process of law, and from denying to any person within their jurisdiction the equal protection of the laws. It contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made."
>
> Missouri *vs.* Lewis, 101 U. S., 22, 30.

The amendment simply means—

> " that no persons or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."
>
> Missouri *vs.* Lewis, (*supra*).

Legislation which, in carrying out a public purpose, is limited in its application, but within the sphere of its operation affects alike all persons similarly situated, is not within the amendment

Barbier *vs.* Connelly, 113 U. S., 27.

It—

> "does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstauces and conditions, both in the privileges conferred and in the liabilities imposed."
>
> Hayes *vs.* Missouri, 120 U. S., 68.

The statute here under discussion treats all barbers alike within the same localities. None can work on Sunday, outside of New York and Saratoga Springs, but all may work in these places until one o'clock in the afternoon. All are, therefore, treated alike, under similar conditions, both in the privileges conferred and the liabilities imposed."

(*b.*) It is not for the plaintiff in error to urge that the act unjustly discriminates in his favor by according him a privilege denied to barbers elsewhere in the state.

**Conclusion.**—The judgment below should be affirmed.

ASA BIRD GARDINER,
District Attorney.

# HAVNOR *v.* NEW YORK.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 227. Argued April 21, 1898. — Decided May 9, 1898.

It was essential, in order to confer jurisdiction on this court, in this case, that the chief judge of the Court of Appeals of the State of New York, or his lawful substitute, or a justice of this court should have allowed the writ and signed the citation; and as the writ was signed by a judge as "asso. judge, Court of Appeals. State of New York," and there was nothing in the record warranting the inference that he was, at that time, acting as chief judge *pro tem.* of that court, the writ is dismissed.

THE case is stated in the opinion.

*Mr. Albert I. Sire*, for plaintiff in error.

*Mr. Asa Bird Gardiner*, for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

Plaintiff in error seeks the reversal of a judgment of the

Court of Appeals of the State of New York, which affirmed a judgment of an appellate division of the Supreme Court of that State, holding valid a judgment entered in the court of special sessions for the city and county of New York, sentencing the plaintiff in error upon a conviction for violation of a statute of the State of New York prohibiting any person from carrying on or engaging in the business of "barbering" on the first day of the week. The record having been remitted by the Court of Appeals to the Supreme Court of the State, the writ of error was directed to the latter tribunal.

The correctness of the ruling of the Court of Appeals, upholding the validity of the statute referred to, was vigorously attacked in argument, emphasis being laid on the fact that three judges dissented from the opinion of the court, two of whom (Judges Gray and Bartlett) delivered opinions.

We are unable, however, to pass upon the question pressed upon our notice as to whether the statute referred to is repugnant to the Constitution of the United States, for the reason that the Court of Appeals of the State of New York is composed of a chief judge and several associate judges, and the writ of error in this case was allowed and the citation signed by an associate judge, who did not purport to act as chief judge or chief judge *pro tem.* of the court. The signature to the allowance of the writ was as follows: "Edward T. Bartlett, Asso. Judge, N. Y. Court of Appeals;" while following the signature to the citation was the designation: "Asso. Judge, Court of Appeals, State of New York." There is nothing contained in the record warranting an inference that the associate judge was at the time acting as chief judge *pro tem.* of the court. True it is, that there is contained in the record, at the end thereof, an affidavit verified by counsel for plaintiff in error on July 29, 1896, stating that the deponent was informed and believed that the chief judge of the Court of Appeals was then abroad in Europe and would be for some space of time to come, while the writ of error was allowed and the citation signed on the 6th of August following. The affidavit purports to have been filed with the papers in the case in the Supreme Court of New

York on September 2, 1896. It manifestly, however, in no particular justifies the inference that the associate justice who allowed the writ was, at the time of such allowance, the chief judge *pro tem.* of the Court of Appeals. It was essential, in order to confer jurisdiction on this court, that the chief judge of the Court of Appeals of New York or his lawful substitute or a Justice of this court should have allowed the writ and signed the citation.

Thus, it is provided in the Revised Statutes as follows:

"SEC. 999. When the writ" (of error) . . . "is issued by the Supreme Court to a state court, the citation shall be signed by the Chief Justice, a judge, or chancellor of such court, rendering the judgment or passing the decree complained of, or by a Justice of the Supreme Court of the United States, and the adverse party shall have at least thirty days' notice."

The provision referred to was contained in the twenty-fifth section of the Judiciary Act of September 24, 1789, c. 20, 1 Stat. 73, 86, and section 7 of the act of February 5, 1867, c. 29, 14 Stat. 387. It was construed in *Bartemeyer* v. *Iowa*, 14 Wall. 26, where the court, taking notice *sua sponte* of the fact that there had been no proper allowance of a writ of error, said (p. 27):

"Writs of error to the state court can only issue when one of the questions mentioned in the 25th section of that act was decided by the court to which the writ is directed, and in order that there may be some security that such a question was decided in the case, the statute requires that the citation must be signed by the Chief Justice or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a Justice of the Supreme Court of the United States. It has been the settled doctrine of this court that a writ of error to a state court must be allowed by one of the judges above mentioned, or it will be dismissed for want of jurisdiction, and the case before us raises the question whether the writ has been allowed by the judge authorized to do so.

"The Supreme Court of Iowa, which rendered the judgment complained of, is composed of a chief justice and three

associate justices, and this writ is allowed by one of the associate justices.

"We are of opinion that the act of Congress requires that, when there is a court so composed, the writ can only be allowed by the chief justice of that court, or by a Justice of the Supreme Court of the United States. In case of a writ to a court composed of a single judge or chancellor, the writ may be allowed by that judge or chancellor, or by a Justice of the Supreme Court of the United States.

"The result of this construction of the statute is that the associate justice of the Supreme Court of Iowa who allowed the present writ had no authority to do so, and it is accordingly dismissed."

The *Bartemeyer case* was approvingly referred to in *Butler* v. *Gage*, 138 U. S. 52, 55, where the court, speaking through Mr. Chief Justice Fuller, said:

"Section 999 of the Revised Statutes provides that the citation shall be signed by the chief justice, judge or chancellor of the court rendering the judgment or passing the decree complained of, or by a Justice of this court; and it was held in *Bartemeyer* v. *Iowa*, 14 Wall. 26, that when the Supreme Court of a State is composed of a chief justice and several associates, and the judgment complained of was rendered by such court, the writ could only be allowed by the chief justice of that court or by a Justice of this court."

In *Butler* v. *Gage*, however, the judge allowing the writ described himself as "Presiding Judge of the Supreme Court of the State of Colorado." As the constitution of Colorado provided that when the chief justice was absent, the judge having the next shortest term should preside in his stead, and as the record showed that the chief justice was absent at the time the writ was allowed, and counsel conceded that the judge who allowed the writ had the next shortest term to serve, it was held that the writ was properly allowed.

Upon the facts appearing in the case at bar, however, it is manifest that the writ of error was not properly allowed, and it must be

*Dismissed.*